(21,829.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1910.

## No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CHEROKEE CITIZENS ENROLLED AS SUCH FOR ALLOTMENT AS OF SEPTEMBER 1, 1902, APPELLANTS,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.


| | Original. | Print |
|---|---|---|
| Petition | 1 | 1 |
| Traverse | 23 | 12 |
| Intervening petition of the Cherokee Nation | 24 | 12 |
| Objection of petitioner to appearance of Cherokee Nation | 37 | 18 |
| Argument and submission | 38 | 18 |
| Findings of fact | 39 | 19 |
| Conclusions of law | 45 | 25 |
| Opinion by Peelle, Ch. J | 46 | 26 |
| Judgment | 56 | 35 |
| Argument and submission on motions for new trial and for amended findings | 57 | 36 |
| Order overruling motion for new trial and amending findings | 57 | 36 |
| Opinion by Howry, J., on motion for new trial | 57 | 36 |
| Application for appeal | 66 | 46 |
| Order allowing appeal | 66 | 46 |
| Clerk's certificate | 67 | 46 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1910.

1

I. *Original Petition.*

Filed March 16, 1907.

In the Court of Claims.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK, on Their Own Behalf and on Behalf of all Cherokee Citizens Enrolled as Such for Allotment as of September 1, 1902,

vs.

THE UNITED STATES.

To the Honorable the Chief Justice and the Associate Justices of the Court of Claims:

Your petitioners, David Muskrat and J. Henry Dick, are citizens of the United States and of the Cherokee Nation, resident in the Indian Territory, and they bring this suit in their own right, and on behalf of all those persons, members of the Cherokee tribe of Indians, enrolled as such for allotment as of September 1, 1902, numbering about 36,000—whose names appear on the citizenship roll made as of that date.

They respectfully state and show that—

I.

Your petitioners, and all those members of the Cherokee tribe of Indians who were not citizens of the United States prior to
2 March 3, 1901, became such on that day, by the terms of the act of Congress of that date, wherein it is provided that: "Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." (31 Stat. L., 1447.)

II.

At the time of the passage of this Act, by which all Indians in the Indian Territory, not already citizens of the United States, became such, the Cherokee Indians, residing in said Territory, were communal owners of four and one-half million acres of land, more or less, with water rights of great value, of certain valuable leases to railroad, pipe line, telegraph and telephone companies, and other public service corporations; also, of valuable public buildings, school houses and town site property; also of the sum of more than

$2,900,000.00 then in the Treasury of the United States, to which fund large sums have since been, and others still are to be, added.

## III.

By the act of July 1, 1902 (32 Stat. L., 716), entitled "An Act to Provide for the Allotment of the Lands of the Cherokee
3 Nation, for the Disposition of Town Sites Therein, and for Other Purposes," it was provided that a roll of citizens should be made as of September 1, 1902, by the Commission to the Five Civilized Tribes, which should contain the names of all persons then living who were entitled to enrollment as members of the Cherokee Tribe; that these names should be placed upon a roll of persons entitled "to participate in the distribution of the tribal property of the Cherokee Nation"; that no child born after said date, to a citizen of the Cherokee Nation, should be entitled to such enrollment or to participation in the distribution of the tribal property; and that the roll thus prepared, when approved by the Secretary of the Interior, should constitute the final roll of Cherokee citizens upon which the allotment of lands and distribution of other tribal property should be made.

It was further declared that this roll, approved by the Secretary of the Interior, should be deemed complete, and that no person whose name did not appear upon said roll should be entitled to participate in any manner in the allotment of the lands or distribution of funds of the Cherokee people.

The pertinent paragraphs of this act are as follows:

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day
4 of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the

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said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made.

When there shall have been submitted to and approved by
5 the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person

or persons who may conceal the death of anyone on said roll
6 as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

It was further provided by this act that the acceptance of a patent for an allotment by an allottee was to operate as a quit claim of the allottee's interest in all other allotments made under the provisions of the act.

Such provision is found in Section 60 of the act, which is as follows:

SEC. 60. Any allottee accepting such patent shall be deemed to

assent to the allotment and conveyance of all the lands of the tribe, as provided in this act, and to relinquish all right, title, and interest to the same except in the proceeds of lands reserved from allotment.

The act further provides that all the funds then belonging to the tribe and all other tribal moneys subsequently acquired should be paid to the individuals per capita, as nearly as practicable. Such provision is found in the following sections of the act:

SEC. 66. All funds of the tribe, and all moneys accruing
7 under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable, and he shall make all needed rules and regulations to carry this provision into effect.

It was further provided that if any person who was entitled to be so enrolled should die subsequent to September 1, 1902, and before receiving his said allotment, the lands which would have been allotted to said person, if living, should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs according to the laws of Arkansas. The provision of the statute on this subject is as follows:

SEC. 20. If any person whose name appears upon the roll pre-
pared as herein provided shall have died subsequent to the
8 first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

## IV.

By the terms of the said act of July 1, 1902, it was provided that it should be submitted for ratification to the Cherokee people. It was so submitted, and, by a popular vote, on August 7, 1902, was rati-

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fied by the Cherokee people; and on August 12, 1902, was proclaimed by the authorized agent of the Government and the principal chief of the Cherokee Nation in the following form:

Whereas, an Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of Town sites therein, and for other purposes," approved July 1, 1902, provides:

"The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same
9 shall be voted upon at a special election to be held for the purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by the Cherokee law, and the votes shall be counted by the Cherokee National Council, if then in session, if not in session the principal chief shall convene an extraordinary session for that purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and make proclamation of the results, and transmit the same to the President of the United States."

And whereas, said principal chief did, within ten days after the passage of said act by Congress, make public proclamation that the same should be voted upon at a special election to be held on the 7th day of August, 1902, in the Cherokee Nation, Indian Territory;

And whereas, said special election was held on the 7th day of August, 1902, in said nation;

And whereas, the said Cherokee National Council convened in extraordinary session for the said purpose, and in the presence of a member of the Commission to the Five Civilized Tribes did, on the 12th day of August, 1902, count the votes cast at said election;

And whereas, the votes cast at said election were canvassed by the Cherokee National Council and the votes cast at said election show that the said act was ratified by a majority of nineteen hundred and sixty-four votes:

Now, therefore, we, Tams Bixby, a member of the Commission to the Five Civilized Tribes, and Thomas M. Buffington, principal chief of the Cherokee Nation, do hereby certify and proclaim that the said act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July 1, 1902, was by popular vote, at a special election held on the 7th day of
10 August, 1902, ratified by the legal voters of the Cherokee Nation by a majority of nineteen hundred and sixty-four votes.

Done at Tahlequah, Cherokee Nation, Indian Territory, on the 12th day of August, 1902.

(Signed) TAMS BIXBY,
*Member of the Commission to the Five Civilized Tribes.*
T. M. BUFFINGTON,
*Principal Chief of the Cherokee Nation.*

V.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by Sec. 11 of said act, fixed the then value of said average allotment at $325. The authority for such proceeding is found in the following sections of the act:

SEC. 9. The lands belonging to the Cherokee tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: Provided, That in the determination of the value of such land consideration shall not be given to the location thereof, to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

SEC. 10. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one
11 hundred and ten acres of the average allotable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

VI.

Under the several provisions of this act the Commission to the Five Civilized Tribes, acting under the direction of the Secretary of the Interior, has prepared a roll of Cherokee citizens for the allotment of lands and distribution of funds, which said roll contains the names of about 36,000 persons, enrolled for allotment as of Sept. 1, 1902.

By the said act of July 1, 1902, it was provided that no application for such enrollment should be received after October 31, 1902, as is shown by Section 30 of the act here set out:

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

The number of persons who would be entitled to enrollment for the purposes of allotment and distribution on July 1, 1902,
12 being unknown, it has resulted that after allotment to those persons now enrolled, in accordance with the provisions of said act of July 1, 1902, there are lands undisposed of sufficient to provide about 3,000 allotments of the present aggregate value of at least three million dollars.

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## VII.

By the terms of said act of July 1, 1902, your petitioners and those on whose behalf they bring this suit, became vested, as individuals, with an indefeasible right, title and interest in and to all the property, real, personal and mixed, of the Cherokee tribe, in the Indian Territory, and were the sole and exclusive owners thereof; and they have agreed by the said act that only those persons duly enrolled thereunder and equally entitled, with them, to allotments, shall share likewise in the distribution of the national funds and other tribal property.

They and those on whose behalf this suit is brought are entitled to have and receive, share and share alike, the said surplus lands, or the proceeds thereof if sold, remaining after the allotments to the persons enrolled under the authority of said act, and likewise, all monies belonging to the Cherokee tribal fund, as well as all sums that may hereafter be added thereto.

But by the act of April 26, 1906, entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes," it was provided that applications should be received by the Commissioner to the Five Civilized Tribes for the enrollment of Cherokees who were
13 minors living on March 4, 1906, whose parents had been enrolled as members of the Cherokee and certain other tribes. Notwithstanding the inclusion of the minors of Cherokee parents, in the words of this act, it was provided, in the second section thereof, that such applications should not be received where the date for filing applications had been fixed by agreement between any tribe and the United States; and, the date for the termination of filing applications having been fixed as October 31, 1902, by the agreement between the United States and the Cherokees, the said provisions of said act of April 26, 1906, did not apply to the Cherokees. The provision of the said act is as follows:

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for
14 equalizing allotments, are hereby restored and reenacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore

made, no contest shall be instituted against such allotment: Provided, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: Provided further, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: Provided, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

But by the act of June 21, 1906 (34 Stat. L., 1908), this act was amended so as to repeal this particular provision and to make the said act of April 26, 1906, in this particular, applicable also to the Cherokees. The provision of the repealing act is as follows:

"That section two of the act entitled 'An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby, amended by striking out thereof the words 'Provided further, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States.' "

It results that the act of April 26, 1906, as amended by the said act of June 21, 1906, deprives petitioners, and all others on whose behalf this suit is brought, of their vested property rights in and to the lands and funds and other tribal property of the Cherokee people, in violation of the constitutional provision that no person shall be deprived of his property without due process of law.

As provided by Section 2 of the said act of April 26, 1906, which, amended as shown by the said act of June 21, 1906, is now in force, if any citizen of the Cherokee tribe shall fail to receive the full quantity of lands therein provided for him as an allottee, he shall be paid out of any of the funds of the said tribe a sum equal to twice the appraised value of the amount of land thus deficient.

As hereinbefore charged, the lands remaining unallotted in the Cherokee Nation are sufficient for only about 3,000 allotments. There have been born to Cherokee citizens enrolled allotment as of September 1, 1902, since said date 5,961 children, who were living on March 4, 1906.

## VIII.

Your petitioners here and now specifically charge that they, and all those persons on whose behalf this suit is brought, became, by the said act of July 1, 1902, vested individually with an absolute and indefeasible title in and to all the lands and funds and to all the tribal property of the said Cherokee people; and are entitled to share in all the same, to the exclusion of all persons not in existence on September 1, 1902, and not enrolled as of said date; and that if the said acts of April 26, 1906, and June 21,

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1906, be enforced, they will be deprived of such property as remains unallotted and undistributed under the terms of the original act, of July 1, 1902, without due process of law; and that said acts are therefore in violation of the said constitutional provisions, and null and void.

IX.

On January 23, 1907, your petitioners, together with Henry Eiffert, Levi Gritts, Nick Comingdeer and Johnson Manning, as co-plaintiffs, filed in the Supreme Court of the District of Columbia a bill in which substantially the foregoing allegations were made. They allege in said bill that the Secretary of the Interior and the Commissioner of Indian Affairs were about to put into force and effect the said provisions of the acts of April 26, 1906, and June 21, 1906, which violated the constitutional rights of your petitioners, and they prayed the issuance of writs of injunction against the Secretary of the Interior and the Commissioner of Indian Affairs, the prayer of said bill being in words and figures following, to-wit:

The premises considered, plaintiffs pray that copy, subpœna, and all proper process issue, making the said Ethan A. Hitchcock, as Secretary of the Interior, and the said Francis E. Leupp, as Com-
17 missioner of Indian Affairs, parties defendant hereto, and requiring them to appear and answer fully the exigencies of this bill; that a preliminary writ of injunction issue to said defendants, or a rule to show cause why such writ should not issue, enjoining and restraining them, and each of them, from proceeding or continuing to allot any of said lands to said minors born after September 1, 1902, or providing for the distribution of any of said funds to such minors; and requiring them, and each of them, to cancel all allotments and distributions, or provision therefor, heretofore by them, or either of them, made or approved; that said plaintiffs have a decree declaring said acts of April 26, 1906, and June 21, 1906, in the particulars hereinbefore set out, in violation of and repugnant to the Constitution of the United States, and null and void and of no effect as to the lands and funds formerly belonging to the Cherokee Nation; that such writ of injunction as shall issue, or such rule as shall proceed, from this court so restraining the defendants be made perpetual; that, upon final hearing the right, title, and interest of plaintiffs and of those in whose behalf this suit is brought be by suitable decree declared, and to that end that all necessary orders and decrees be entered and all proper process employed. Plaintiffs pray also for general relief.

But before a hearing on the applications for the writs of injunction could be had, a bill was introduced in Congress, providing the reference of this case to this Honorable Court. Your petitioners, desiring the judgment of this court, and seeking the speedier disposition
of the litigation which would be so accomplished, and the
18 Department of the Interior being likewise disposed, it was stipulated in said cause in the said Supreme Court of the District of Columbia that it should be continued and remain pending until Congress should determine whether or not the bill to refer the said cause to this court should be passed.

## X.

By an item on the Indian Appropriation Bill entitled "An Act making appropriation for the Current and Contingent Expenses of the Indian Department and for fulfilling Treaty Stipulations for the Various Indian Tribes for the Fiscal Year ending June 30, 1908, and for Other Purposes" (Public No. 154. Approved March 1st, 1907), it was enacted—

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interest in the property allotted under the act of July 1, 1902, an act entitled 'An Act to provide for the allotment of lands to the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, be and they are hereby authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July 1, 1902, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final
19 distribution of lands and funds of the Cherokees, beyond those enrolled for allotment as of September 1, 1902, as provided for in the said act of July 1, 1902.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September 1, 1907, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts, and by the Attorney General, who is hereby charged with the defence of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of said acts, authorized to be brought into question in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above named parties, in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury, belonging to the beneficiaries under the said act of July 1, 1902."

## XI.

Your petitioners charge that they are the identical persons named in the said jurisdictional act as David Muskrat and J. Henry Dick, and that, under the authority of said act, they have the right to bring this suit for and on behalf of themselves and of all
20 Cherokee citizens enrolled as of September 1, 1902, in accordance with the provisions of the act of July 1, 1902.

Wherefore, the premises considered, your petitioners pray the judgment and decree of this Honorable Court, declaring and adjudging—

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1. That the rights of these petitioners and all other Cherokee citizens enrolled as such for allotment as of September 1, 1902, in their respective allotments of land and in the unallotted lands and undivided funds of the Cherokee Nation, became and were fixed and determined by the provisions of said act of July 1, 1902, and that the same could not be diminished in any manner whatsoever by any subsequent acts of Congress.

2. That the Acts of Congress of April 26, 1906, and June 21, 1906, in so far as they attempt to increase the number of persons entitled to share in the final distribution of the lands and funds of the Cherokee people in excess of those lawfully enrolled for allotment under the Act of July 1, 1902, and entitled to enrollment as of September 1, 1902, are unconstitutional, null and void.

3. That the 5,961 persons, who were enrolled under the provisions of said acts of April 26, 1906, and June 21, 1906, are not entitled, under the law, to be enrolled for participation in the lands and funds of the Cherokee people.

4. That the unallotted lands of the Cherokee people, or the proceeds thereof if sold, and the proceeds of all public buildings, and other realty belonging to said Cherokees, which has not been allotted, including valuable water rights; the funds held in the Treasury of the United States, amounting to nearly $3,000,000 be-
21 longing to the Cherokee people, all funds arising from the sale of town sites, from leases to individuals, to railroads, pipe lines, telephone lines, and other corporate bodies, and the proceeds of the sale of rights of way to these corporations, or to other corporations or individuals, together with all other funds belonging to the Cherokee people, or arising from the sale of Cherokee property, are, by law, distributable, per capita, among those Cherokee citizens who have been enrolled as of September 1, 1902.

Your petitioners further pray the judgment and decree of this Honorable Court, declaring and adjudging the said acts of April 26, 1906, and June 21, 1906, in the particulars hereinbefore set out, to be in violation of, and repugnant to, the Constitution of the United States, and null and void, and of no effect as to lands and funds belonging to the Cherokee people on July 1, 1902, and as to the rights of your petitioners and all persons on whose behalf this suit is brought in and to said lands, funds and other said tribal property.

And they pray also for such other and further decrees as shall be within the jurisdiction of this Honorable Court under the act hereinbefore set out, and for general relief.

DAVID MUSKRAT.
J. HENRY DICK.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
*Attorneys for Petitioners.*

22 DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me, J. Henry Dick, who being first sworn, deposes and says, I am one of the petitioners in the foregoing petition; I have carefully read the statements thereof; they are true to the best of my knowledge, information and belief.

J. HENRY DICK.

Subscribed and sworn to before me this 4th day of March, 1907
JENNIE M. SHEFFER,
*Notary Public in and for the District of Columbia.*

23 II. *Traverse.*

Filed November 18, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK et al.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.
JOHN Q. THOMPSON,
*Assistant Attorney General.*

24 III. *Intervening Petition of the Cherokee Nation.*

Filed be Leave of Court March 3, 1908.

In the Court of Claims of the United States.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK
v.
THE UNITED STATES.

*Intervening Petition of the Cherokee Nation.*

To the Honorable Chief Justice and Associates Justices of the Court of Claims of the United States:

The Cherokee Nation by its principal chief, William C. Rogers, represented by its attorney in fact, William W. Hastings, respectfully shows to this court:

1. As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause.

2. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States.

3. That under and by virtue of the provisions of certain acts of Congress and of the treaties between the United States and the Cherokee Nation of Indians, and the patent of the United States to the Cherokee Nation issued on the 31st day of December, 1838, as supplemented and interpreted by the treaty between the
25 same parties on August 17, 1846, the people of the Cherokee Nation of Indians became the owners of the lands embraced within the limits of the Cherokee Nation, formerly Indian Territory, now Oklahoma, and are possessed of and now own all of said lands that have not been allotted to individual allottees.

4. That said Cherokee Nation as a body politic possessed and under the provisions of the treaties aforesaid was granted the right of local self-government with full authority to make and carry into

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effect all such laws as it might deem necessary for the government and protection of persons and property within its jurisdiction, belonging to its own people or such persons who might be associated or connected with them.

5. In the exercise of this governmental power the people of the Cherokee Nation ordained and established a written constitution and system or code of laws.

6. That by an act of Congress approved March 3, 1893 (27 Stat. L., 645), a Commission, hereafter known as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of the Commission appointed under said act was continued from year to year by acts of Congress.

7. On June 10, 1896, Congress by an act (29 Stat. L., 321) conferred the additional authority upon the Commission referred to in the sixth paragraph hereof to hear and determine the applica-
26 tions of all persons for admission to citizenship in the Cherokee Nation with the right of appeal to both the applicant and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), it was provided that an appeal might be taken by either party to the Supreme Court of the United States.

8. By an act approved June 28, 1898 (30 Stat. L., 495), Congress authorized and directed the Commission to the Five Civilized Tribes, with the approval of the Secretary of the Interior, to make a final roll of all persons entitled to be enrolled as citizens of the Cherokee Nation, with instructions in section 21 of said act as to how said roll should be made; and said Commission was further instructed by the act of May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the nation and duly and lawfully enrolled and admitted as such.

9. On May 11, 1900, the Commission to the Five Civilized Tribes began making the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat. L., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat. L., 221); March 3, 1901 (31 Stat. L., 1073); July 1, 1902 (32 Stat. L., 716); April 26, 1906 (34 Stat. L., 137), and June 21, 1906 (34 Stat., L., 324), were passed.

27 10. By an act of Congress approved March 3, 1901 (31 Stat. L., 1073), the Secretary of the Interior was authorized and directed to fix a time by agreement with the Cherokee Nation for closing the roll which was being made by the Commission to the Five Civilized Tribes under the acts of June 28, 1898, and May 31, 1900, and upon failure or refusal of the Cherokee Nation to enter into an agreement with the Secretary of the Interior fixing the time for the closing of said roll, the Secretary of the Interior was authorized to fix the time for the closing of said roll, after which no name should be added thereto, and the Secretary, having failed to make an agreement with the Cherokee Nation fixing a date for the closing of said roll, on January 15, 1902, fixed the date for the closing of said roll on July 1, 1902.

11. Section 25 of the act of Congress approved July 1, 1902 (32 Stat. L., 716), extended the time for the closing of the Cherokee roll until September 1, 1902, and section 29 of said act directed the Commission to the Five Civilized Tribes from time to time to forward to the Secretary of the Interior lists of the names of persons found entitled to enrollment, and in compliance with said provision lists were forwarded to the Secretary containing the names of persons found entitled to be enrolled as citizens of the Cherokee Nation for the approval of the Secretary of the Interior, which were, as amended and corrected, approved up to and including March 4, 1907.

28 12. That section 3, Article XI, of the constitution of the Cherokee Nation provides:

When the national council shall determine expediency of appointing delegates or other public agents for the purpose of transacting business with the Government of the United States, the principal chief shall recommend and, by and with the advice and consent of the national committee, appoint and commission such delegates or public agents accordingly. On all matters of interest touching the rights of the citizens of this Nation which may require the attention of the United States Government the principal chief shall keep up a friendly correspondence with that Government through the medium of its proper officers.

And under section 1 of amendments to Article III, of the said constitution, adopted November 26, 1866, the name of the upper branch of the Cherokee national council was changed from "national committee" to "senate."

13. On September 28, 1905, the Cherokee national council passed an act, which was approved by the President of the United States, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs," which is in words and figures as follows, to wit:

Whereas under existing laws the tribal government of Cherokee Nation ceases on the fourth day of March, 1906, and,

29 Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people, remain open and unprovided for by existing laws and treaties, and,

Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf, therefore, be it enacted by the National Council of the Cherokee Nation:

SECTION 1. That the principal chief be and he is hereby authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States. Be it further enacted:

SEC. 2. That each member of said commission shall receive the sum of fifteen dollars per diem while employed upon the duties of their appointment as hereinafter provided, which sum shall be taken and accepted by the said commissioners in full payment for their per diem and all expenses: *Provided, however*, That the sum paid

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each commissioner shall not exceed the sum of one thousand dollars, and the sum of three thousand dollars be, and the same is hereby, appropriated out of the general fund of the Cherokee Nation, or so much thereof as may be necessary, to carry into effect
30 the provisions of this section, and a further sum of two hundred dollars be, and the same is hereby, appropriated out of the same fund, or so much thereof as may be necessary, to pay for stationery, stenographic service, and printing, and all moneys appropriated under this act must be drawn by warrants by the principal chief, through requisitions made to him by the chairman of the said commission, accompanied by vouchers duly certified.

Be it further enacted:

SEC. 3. That the services of said commission shall only begin when they are called together by the principal chief or the Secretary of the Interior, and their services may be discontinued by the principal chief of the Cherokee Nation or the Secretary of the Interior.

Be it further enacted:

SEC. 4. That the principal chief, or in the event of a written statement by him of his inability to attend at any time, the assistant chief, is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation other than the salary already provided by law for such officers, respectively, except said principal chief, or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is
31 hereby appropriated out of the general fund not otherwise appropriated, to pay the same.

Be it further enacted:

SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work, without additional expense to the Cherokee Nation.

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred. McDaniel.

14. On September 29 the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred. McDaniel, by a joint resolution of the national council of the Cherokee Nation, was instructed as follows:

*Resolved,* It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

First. For the participation of all children born since September 1, 1902, and prior to March 4, 1906, who but for the limitation contained in section 25 of the act of Congress of July 1, 1902, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress; if this cannot be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

32 Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected, and our obligations satisfied, or provisions made therefor.

Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

*Be it further resolved*, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolution.

15. That said Cherokee commission, accompanied by W. C. Rogers, Principal Chief of the Cherokee Nation and ex officio a member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and

33 recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat. L., 137), as amended by act of June 21, 1906 (34 Stat. L., 325), providing for the enrollment of minor children living March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation, or who had applications pending for enrollment as citizens of the Cherokee Nation, with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906.

16. That section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation.

And said section 20 of the treaty of 19th of July, 1866, provides as follows:

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.

17. That said section 2 of the act of April 26, 1906 (34 Stat. L., 137), also provided "that the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."

34 18. That lists containing the names of all minor children enrolled under section 2 of the act of April 26, 1906, as

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amended by the act of June 21, 1906, were approved by the Secretary of the Interior and said minor children were finally enrolled on or before March 4, 1907, and not thereafter.

19. That upon the date of the approval of the act of April 26, 1906 (34 Stat. L., 137), there was then and is now a large part of the lands of the Cherokee Nation unallotted, and there is enough land and moneys belonging to the Cherokee Nation to equalize, as provided in said act, the allotments of all persons whose names are upon the final roll approved by the Secretary of the Interior as citizens of the Cherokee Nation.

20. That the tribal existence of the Cherokee Nation was extended by joint resolution of the Congress of the United States approved March 2, 1906, as follows:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

And the tribal government of the Cherokee Nation was also continued by section 28 of the act of April 26, 1906 (34 Stat. L.,
35 137), until otherwise provided by law, and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation.

21. That in accordance with section 28 of the act of April 26, 1906 (34 Stat. L., 137), W. C. Rogers, the duly elected, recognized, and acting principal chief of the Cherokee Nation has employed William W. Hastings as attorney for the Cherokee Nation by contract, which contract was approved by the President of the United States, as provided in said section 28, on March 29, 1907, and expires March 4, 1908, and among other things said contract provides that the said William W. Hastings shall represent the Cherokee Nation in all cases in which it is interested before the Court of Claims, when the interests of the Cherokee Nation require it, or when directed by the principal chief.

22. That the Cherokee Nation is the party directly interested in the determination of this suit and the United States is only nominally interested therein, and the Cherokee Nation desires the constitutionality of section two of the act of April 26, 1906, as amended by the act of June 21, 1906, sustained by the court and all of the said minor children born to recognized and enrolled parents living on March 4, 1906, to remain upon the final roll as citizens of the Cherokee Nation, with equal rights in the division of lands and moneys belonging to the Cherokee Nation as all other enrolled citizens.

Wherefore your petitioner prays the court: First, that the
36 Cherokee Nation may be allowed to intervene in said case and made party defendant for the reasons hereinabove assigned; and second, that the minor children enrolled as citizens of the Cherokee Nation under the act of April 26, 1906, as amended

by the act of June 21, 1906, may be allowed to remain upon the final rolls of the Cherokee Nation and participate in the allotment of Cherokee lands and the distribution of Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts of June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 Stat. L., 221), March 3, 1901 (31 Stat. L., 1073), and July 1, 1902 (32 Stat. L., 716).

WILLIAM W. HASTINGS,
*Attorney in Fact for the Cherokee Nation.*

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a notary public in and for the District of Columbia, personally appeared William W. Hastings, and made oath in due form of law that the matters and things contained in the foregoing petition are true as herein set forth, to the best of his knowledge and belief.

Witness my hand and notarial seal this 27th day of February, 1908.

[SEAL.] L. E. KIDWELL,
*Notary Public.*

Filed February 29, 1908. Allowed by the court March 3, 1908.

37 IV. *Objection of Petitioners to Appearance of Cherokee Nation.*

Filed Nov. 18, 1908.

Objection is made by the petitioners in this case, to the appearance of the Cherokee Nation, as sought to be effected by its intervening petition, for the following reasons, to-wit:

1. The act provides that the United States alone shall be made a party defendant to the suit.

2. No complaint whatever is made by the petitioners against the Cherokee Nation, and no recovery sought against it.

3. Whatever judgment may be rendered by this court cannot affect the Cherokee Nation.

4. The case involves only the validity of certain enactments of Congress.

5. There is no such body as the Cherokee Nation and was not at the time of the filing of the petition.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
*Attorneys.*

38 V. *Argument and Submission of Case.*

On November 18, 1908 Mr. William H. Robeson was heard in opposition to the right of the Cherokee Nation to appear and be heard in this case and Mr. William W. Hastings in support of it. Mr. Daniel B. Henderson was heard for the claimants.

On November 19, 1908 Mr. Hastings was heard for the Cherokee Nation and Mr. Robeson was heard for the claimants.

On November 24, 1908 Mr. Robeson was heard further and the case was submitted.

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VI. *Findings of Fact and Conclusions of Law and Opinion of the Court.*

Filed January 4, 1909.

This case coming on to be heard on the petition of David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled for allotment as of September 1, 1902, and on the intervening petition of the Cherokee Nation, by its principal chief, William C. Rogers, the court, upon the evidence adduced and after considering the argument and briefs of counsel on both sides, makes the following

FINDINGS OF FACT:

I.

The Cherokee Nation of Indians is a body politic, recognized as such by the United States, with a written constitution and system or code of laws and the right of local self-government granted under the provisions of treaties made with the United States and with full authority to make and carry into effect all such laws deemed necessary for the government and protection of persons and property within its jurisdiction, subject only to the paramount authority of the United States (117 U. S., 288; 187 Ibid., 294; 193 Ibid., 127), and the limitations imposed by existing laws.

II.

By an act of Congress approved March 3, 1893 (27 Stat., 645), a commission, afterwards designated as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of said commission appointed under said act was continued from year to year by subsequent acts of Congress.

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III.

By the act of June 10, 1896 (29 Stat. L., 321), additional authority was conferred upon said commission to hear and determine applications of persons for admission to citizenship in the Cherokee Nation, with the right of appeal both to the applicants and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), an appeal was provided for either party to the Supreme Court of the United States (174 U. S., 445).

IV.

By the act June 28, 1898 (30 Stat. L., 495), said commission was authorized to make, with the approval of the Secretary of the Interior, a final roll of persons entitled to be enrolled as citizens of the Cherokee Nation. Said commission was further instructed by the act May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the Cherokee Nation and duly and lawfully enrolled and admitted as such.

V.

By the act March 3, 1901 (31 Stat. L., 1447), amending section 6, act February 8, 1887 (24 Stat. L., 390), it was provided: "Every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

VI.

On May 11, 1900, the Commission to the Five Civilized Tribes began making a roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat., 221), March 3, 1901 (31 Stat., 1073), July 1, 1902 (32 Stat., 716), April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 325), were passed. Under the act of March 3, 1901 (31 Stat. L., 1077), the Secretary of the Interior fixed the time for closing the roll as of date July 1, 1902.

VII.

By the act July 1, 1902 (32 Stat. L., 716), section 25 thereof provided that the roll of citizens of said Cherokee Nation should be made as of September 1, 1902. In accordance with the express terms of said act it was submitted for ratification to the Cherokee people by popular vote, and on August 7, 1902, said act was ratified by a majority of 1,964 votes, which ratification was, as provided by said act, certified August 12, 1902, by one of the commissioners to the said civilized tribes and the principal chief of the Cherokee Nation to the President of the United States.

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After the passage of said act the date as of which said roll should be made was changed from July 1, 1902, to September 1, 1902, to conform to said act.

As provided in section 29 of said act, said commissioners from time to time forwarded lists containing the names of persons entitled to be enrolled to the Secretary of the Interior, which were, as corrected and amended, approved by him. The roll so made contains the names of 37,561 persons enrolled for allotment of lands and for the distribution of funds.

By said act of 1902 it was also provided that no child born after said date to a citizen of the Cherokee Nation should be entitled to such allotment or participation in the tribal property; that the roll when so made and approved should be final, upon which the allotment of lands and the distribution of other tribal property should be made.

## VIII.

At the time of the passage of said act, July 1, 1902, the members of said tribe residing in said Territory were the communal owners under treaties, among other things, of about four and a half million acres of land, with water rights, leases to railroads, pipe lines, telegraph and telephone companies, and other public-service corporations; also of valuable public buildings, schoolhouses, and town-site property, and also of a large sum in the Treasury of the United States, which still remains in the Treasury, and to which other sums have been added and still others are to be added, exceeding $2,000,000.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by section 11 of said act, fixed the then value of said average allotment at $325.60.

After the allotment to those entitled under the provisions of said act July 1, 1902, upon the basis aforesaid, there yet remain sufficient lands to provide about 3,800 allotments of the present aggregate value of about $2,500,000. None of the funds in the United States Treasury to the credit of the Cherokee Nation have been distributed.

## IX.

By section 2, act of April 26, 1906, as amended by the act June 21, 1906 (34 Stat. L., 137 and 341)—making said act applicable to Cherokees—the time for the completion of the roll so made under the act July 1, 1902, and prior acts, was extended or supplemented by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of said act.

Under said acts minor children of enrolled Cherokee parents born after September 1, 1902, and living on March 4, 1906, to the number of 5,610 were enrolled on separate lists as other Cherokee citizens had been under the act of July 1, 1902, and which were, after correction and amendment, approved by the Secretary of the Interior on or

before March 4, 1907, as provided by said act of April 26 as amended by the act of June 21, 1906; and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to said Cherokee Nation to equalize the allotments of all Cherokee citizens whose names are upon the roll last approved by the Secretary of the Interior under said acts of April 26 and June 21, 1906.

X.

The petitioners and other persons named as complainants heretofore, to wit, on January 23, 1907, filed a bill in the supreme court of the District of Columbia, containing substantially the allegations which are embodied in the petition herein, and sought the issuance of writs of injunction against the Secretary of the Interior to prevent the allotment of lands and the distribution of funds in accordance with the act of April 26, 1906 (supra), as amended by the act of June 21, 1906 (supra). But before a hearing on the applications for writs of injunction was had, an act was passed by Congress referring the issues presented in that case to this court. Said jurisdictional act is a part of the Indian appropriation bill, entitled "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with the various Indian tribes for the fiscal year ending June 30, 1908, and for other purposes," Public No. 154, approved March 1, 1907, and is in the following words: "That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interest in the property allotted under the act of July 1, 1902, an act entitled 'An act to provide for the allotment of lands to the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts in Congress passed since the said act of July 1, 1902, so far as the said acts, or any of them, attempt to increase or extend the restrictions upon alienations, incumbrance, or the right to lease the allotment of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees, beyond those enrolled for allotment as of September 1, 1902, as provided for in the said act of July 1, 1902.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September 1, 1907, against the United States as a party defendant, and, for the speedy disposition of the questions involved, preference shall be given to same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of said acts authorized to be brought into question in either or both of said cases, the Court of Claims shall determine the amount

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to be paid the attorneys employed by the above-named parties in the prosecution thereof for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July 1, 1902."

## XI.

On September 28, 1905, the Cherokee national council, in conformity with section 3, article 6, of the constitution of the Cherokee Nation, passed an act, which was approved November 7, 1905, by the President of the United States, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs," the pertinent parts of which were in words and figures as follows, to wit:

"Whereas under existing laws the tribal government of the Cherokee Nation ceases on the fourth day of March, nineteen hundred and six; and

"Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people remain open and unprovided for by existing laws and treaties; and

"Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf: Therefore

"*Be it enacted by the national council of the Cherokee Nation:* SECTION 1. That the principal chief be, and he is hereby, authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the Senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States.

* * * * * * *

"*Be it further enacted:* SEC. 4. That the principal chief or, in the event of a written statement by him of his inability to attend at any time, the assistant chief is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation other than the salary already provided by law for such officers, respectively, except said principal chief or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is hereby appropriated, out of the general fund not otherwise appropriated, to pay the same.

"*Be it further enacted:* SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work without additional expense to the Cherokee Nation."

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred McDaniel.

## XII.

On September 29, 1905, the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred McDaniel, by a joint resolution of the national council of the Cherokee Nation was instructed as follows:

"*Resolved*, It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

"First. For the participation of all children born since September first, nineteen hundred and two, and prior to March fourth, nineteen hundred and six, who but for the limitation contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this can not be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

"Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible, and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected and our obligations satisfied, or provisions made therefor.

"Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

"*Be it further resolved*, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolution." After the commencement of the suit herein, to wit, August 17, 1907, said resolutions were approved by the President of the United States.

## XIII.

The Cherokee commission, accompanied by W. C. Rogers, principal chief of the Cherokee Nation and ex officio member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat., 137), providing for the enrollment of minor children living on March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906, and amended by the act of June 21, 1906 (32 Stat., 325).

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## XIV.

Section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

"The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the CherokeeNation."

And said section 20 of the treaty of 19th of July, 1866 (14 Stat., 799), provides as follows:

"Whenever the Cherokee national council shall request it the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and alloted among them at the expense of the United States."

## XV.

By section 63, act July 1, 1902, *supra*, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906." But by joint resolution of Congress approved March 2, 1906 (34 Stat., 822), it was extended as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

And the tribal government of the Cherokee Nation was thereafter continued by section 28 of the act of April 26, 1906 (34 Stat., 137), "until otherwise provided by law," and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation. The allottable lands and funds remaining after the allotments among those enrolled under the act of July 1, 1902, were allotted and distribution provided for to those enrolled under said act of April 26, as amended by the act of June 21, 1906. Said allotments are treated by the Interior Department "as tentative allotments," their finality depending upon the construction of said acts of April and June, 1906.

### CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides, as conclusions of law, that—

1. The petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States on July 1, 1902, the date of the passage of the act of that date, as were their children thereafter born as set forth in finding V.

2. The Cherokee Nation is and always has been recognized by the United States as a distinct political community, subject only to the paramount authority of the United States.

3. The tribal existence and present tribal government of said Cherokee Nation were existing at the date of the passage of the acts April 26 and June 21, 1906, as set forth in finding XV.

4. No citizen of the Cherokee Nation has any vested interest in the unallotted lands of said nation or in the undistributed funds in the Treasury of the United States to the credit of said nation or tribe.

5. Section 2 of the act April 26, as amended by the act June 21, 1906, was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the national council of the Cherokee Nation, with the approval of the President of the United States, as set forth in findings XI, XII, and XIII.

6. The Congress have plenary power to guard, protect, and administer upon the tribal property of the Cherokee Nation, and that power is political, and is for the legislative branch and not for the courts to determine.

7. The provisions of the act April 26, as amended by said act of June 21, 1906, authorizing the enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is a valid constitutional statute, and the minor children so enrolled, as therein provided and set forth in the findings herein, are entitled to remain upon the final Cherokee roll for the purpose of participating in the allotment of the Cherokee lands and in the distribution of the Cherokee tribal funds in the same manner and to the same extent as Cherokee citizens enrolled under the acts June 28, 1898 (30 Stat. L., 495), May 31, 1900 (31 Ibid., 221), and July 1, 1902 (32 Ibid., 716).

8. The petition is therefore dismissed and judgment ordered for the defendants.

OPINION.

PEELLE, CH. J., delivered the opinion of the court:

By a provision in the Indian appropriation act March 1, 1907 (34 Stat. L., 1015, 1028), set out in finding X, jurisdiction was conferred upon the court, with the right of appeal, "to determine the validity" of certain acts of Congress passed since July 1, 1902, respecting the rights, privileges, and immunities of Cherokee Indians, citizens of the United States, in and to the common property of the Cherokee Nation on September 1, 1902, the date fixed by the act of July 1, 1902 (32 Stat. L., 716), for the allotment of their lands, which date of allotment was, by the act of April 26, 1906, as amended by the act of June 21, 1906—to apply to Cherokee Indians—extended to March 4, 1906 (34 Stat. L., 137 and 341). Herein lies the controversy.

The court, on application therefor, over the objections of the claimants, permitted the Cherokee Nation, through its principal chief, to file its intervening petition, and its national attorney to participate in the argument.

The validity of the statutes involved might perhaps have been determined on demurrer had the defendants so elected; but they, deeming the action of the Cherokee council providing for the appointment of three commissioners to secure legislation by Congress providing for the enrollment of children born of enrolled Cherokee parents after September 1, 1902, essential, tendered the general issue, and accordingly both parties have asked the court to make findings of fact, which we have done, though the findings are mainly deductions from statutes and treaties, and may not be deemed necessary by the Supreme Court, in case of appeal, to determine the validity of the acts in question.

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By virtue of the act March 3, 1901 (31 Stat. L., 1447), amending section 6 act February 8, 1887 (24 Stat. L., 390), the Cherokees and other Indians in the Indian Territory were made citizens of the United States "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The act of July 1, 1902, in compliance with its terms (sections 74 and 75), was submitted to the Cherokee people for ratification by popular vote, and was so ratified August 7, 1902, and, as in said act provided, was duly certified to the President of the United States August 12, 1902. The claimants, as well as the defendants and Cherokee Nation, intervenor, concede the validity of said act, although by virtue of the Indian appropriation act of March 3, 1901 (31 Stat. L., 1073), the Secretary of the Interior was authorized to and did fix the time for the enrollment as of July 1, 1902, which date was extended by said act of July 1, 1902, to September 1, 1902.

The court deems it unnecessary to consider in detail the manner and method of the appraisement of the lands and the making of the roll upon which the allotments were made or the various acts of Congress passed prior to July 1, 1902, respecting the creation and authority of the Commission to the Five Civilized Tribes, diminishing the tribal power and subjecting the legislation of the nation to the approval of the President of the United States, except so far as they show the purpose of Congress in dealing with the tribal government as well as with the tribal property of the Cherokee Nation. It is enough to say that the allotment under the act of July 1, 1902, with the consent of the Cherokee people, was authorized, a roll was made of all Cherokee citizens as of September 1, 1902, and approved by the Secretary of the Interior, under which roll allotments to each individual were made as provided by section 11 of the act of "lands equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation," the value of which land, in the manner provided by section 9 of the act, was fixed at $325.60.

After said allotments had been made there remained unallotted lands sufficient for about 3,800 such average allotments, which unallotted lands, together with the undistributed funds in the United States Treasury, to the credit of the Cherokee Nation—exceeding $2,000,000—are ample, as provided by the act of April 26, 1906, as amended to equalize the allotments of all persons on the final or extended roll of Cherokee citizens as of March 4, 1906.

As set forth in findings XI, XII, and XIII, said acts of April and June, 1906, were passed by Congress at the request and on the petition therefor of the representatives of the Cherokee Nation appointed therefor with the approval of the President of the United States (31 Stat. L., 1077), and, therefore, so far as the nation could act in behalf of its citizens in that respect their consent, if that were necessary, was given to said acts.

The claimants' contention is that by virtue of the citizenship of the Cherokees under the act of March 3, 1901, and the allotment act of July 1, 1902, those enrolled under said act as of September 1, 1902, thereby acquired vested rights in and to all the common property of the Cherokee Nation, and having thereby acquired such vested rights it was not within the power of Congress to divest them thereof; that section 2 of said act of April 26, 1906, as amended, seeks to take the private property of the claimants, citizens of the United States,

without due process of law, and is therefore in violation of the fifth amendment to the Constitution of the United States.

On the part of the defendants, as well as of the Cherokee Nation, intervenor herein, it is contended that in respect to the tribal property, i. e., the unallotted lands and undistributed funds of said nation, the power of Congress is plenary.

The question, stripped of unnecessary verbiage, is: Did Congress by the act of July 1, 1902, in authorizing, with the consent of the members of the Cherokee Nation, the allotment and distribution of their common property as of September 1, 1902, thereby exhaust the conceded, hitherto, paramount authority of the United States over the tribal property of said nation?

For many years prior to said allotment act of July 1, 1902, and subsequent thereto, the Cherokee Nation, in the Indian Territory, held title to the lands sought to be allotted by patent issued by the United States December 31, 1838, in conformity with treaties then existing between them and said nation, subject, however, to the conditions that the nation should not become extinct or abandon possession of said land; and in the case of *Cherokee Nation* v. *Journeycake* (155 U. S., 196, 207) it was held that "by that patent, whatever of title was conveyed was conveyed to the Cherokees, as a nation, and no title was vested in severalty in the Cherokees, or any of them." (*Cherokee Trust Fund*, 117 U. S., 288.)

In *Cherokee* v. *Hitchcock* (187 U. S., 294, 307) it was said: "Whatever title the Indians have is in the tribe and not in the individual, although held by the tribe for the common use and benefit of all the members."

The Cherokee constitution provides that "the lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation." (Sec. 2 of amendment to art. 1, constitution Cherokee Nation.)

By section 15, act March 3, 1893 (27 Stat. L., 612, 645), quoted in the case of the *Matter of Heff* (197 U. S., 488, 500)—as indicating the interest the United States claimed therein—it is provided that upon the allotment "the reversionary interest of the United States therein shall be relinquished and shall cease."

The members of said nation residing in the Indian Territory were, therefore, communal owners of the lands and funds of said nation on July 1, 1902, when the allotment act of that date was passed, as they were when the roll was made thereunder as of September 1, 1902, if not later; and had all of said lands and funds been actually allotted and distributed as of that date nothing would have remained upon which the subsequent acts, by their terms, could operate. The amount of land allotted was not determined by the commissioners, but was fixed in section 11 of the act.

On the other hand, each member of the nation is entitled, by reason of his communal ownership, to an equal share with his coowners in the common property, but the nature of the title is such that no right can vest in the individual to such share before allotment, even though he be a citizen of the United States. Nor is such right to the share enlarged or transformed into a vested right by the act of July 1, 1902,

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providing for the method and time of making such allotment, as, by section 31 of the act, the right of a member dying prior to September 1, 1902, becomes extinct and passes to the tribe in general. Nor is it necessary to this case for the court to consider whether the allottees in the allotments made under said act as of September 1, 1902, have vested rights in the shares so allotted further than to say that by section 21 of said act it is provided that the certificate shall be conclusive evidence of the right of the allottees to the tract of land described therein; but said allotments are not sought to be affected by the acts in question; and there yet remain unallotted lands and undistributed funds with which to equalize, as provided by the act of April 26, 1906, as amended, the allotments of all persons whose names appear upon the final or extended roll as of March 4, 1906.

Section 63 of the act of July 1, 1902, provides that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six;" but by joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were "continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law." And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was, with certain restrictions therein specified, "continued in full force and effect for all purposes authorized by law until otherwise provided by law."

Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof.

We must first note that the enrollments under the act of April 26, 1906, as amended, were made as of March 4, 1906, the date when, by the act of July 1, 1902, the tribal government of the Cherokee Nation was to cease. The evident purpose of Congress by said act of April, 1906, as amended, was to enroll all Cherokee citizens living as of the date when the tribal government was to cease.

While it was within the power of Congress, by the act of July 1, 1902, to fix the date for enrollment prior to the time therein fixed for the termination of the tribal government, no sufficient reason, other than the act itself, can be urged therefor on either legal or equitable grounds, and this was doubtless the view of Congress when, by the acts of April and June, 1906, the time of enrollment was extended to the date fixed for the termination of the tribal government. This act is in harmony with the act June 28, 1898 (30 Stat. L., 495, 513), respecting the Choctaw and Chickasaw nations, wherein it is provided that: "It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States."

True, the acts of April and June, 1906, were passed after the date fixed for the termination of the tribal government, but their operation respecting those to be enrolled was limited to March 4, 1906. Hence but for these acts children of enrolled Cherokee parents under

the act of July 1, 1902, though living during the existence of the tribal government, would have been denied their rights as communal owners in the common property; and it is no answer to say that the communal rights of the members of the nation in the lands were severed by the act of July 1, 1902, and thereby became vested as of the date of enrollment thereunder, for the tribal government was to continue until March 4, 1906, of which the allottees were bound to take notice; and so long as the tribal government existed no right as between themselves or as against the United States could vest in severalty in the common or unallotted property. In other words, nothing short of actual allotment in severalty, as provided by law, will give the individual members of the nation vested rights as against the United States. The act does not seek to divert the lands from the communal owners and give them to strangers, but merely extends the time for allotment so as to include and equalize allotments to all those living on the date fixed for the termination of the tribal government.

The relation between the Government and the Indians being that of a superior dealing with an inferior the Government may discontinue that relation at any time, but it is for Congress and not for the courts to determine when that shall take place. Nor is the power of the Federal Government to protect the Indians "dependent upon the preservation of tribal relations." (*Matter of Heff*, 197 U. S., 488, 496.)

Although the Cherokee Nation as a body politic, with a written constitution and system of laws for the protection of persons and property within its jurisdiction, has been recognized by the United States in their treaties with them, nevertheless the Cherokees since the treaty between them and the United States of November 28, 1785 (7 Stat. L., 18), have acknowledged that they were under the protection of the United States and no other sovereign.

A similar provision was in the treaty made with them as a nation July 2, 1791 (7 Ibid., 39). (*Cherokee Trust Funds*, 117 U. S., 288, 295; *Delaware Indians* v. *Cherokee Nation*, 197 Ibid., 127).

The court, in the first of the cases cited, makes reference to and comments on the various treaties between the Cherokees before and after their separation and their subsequent union, in all of which treaties the paramount authority of the United States for their protection is acknowledged. But independent of such treaties and their acknowledgment, the Cherokees and other Indians have been, since our Government was organized, subject to the paramount authority of the United States, exercised by Congress; and they and the territory occupied by them being within the geographical limits of the United States have at all times been subject to the laws of Congress enacted for their protection as well as for the protection of the people with whom they come in contact (*Worcester* v. *Georgia*, 6 Pet., 515). In other words, the United States, had they so elected, might from the first, without the consent of the Indians, have controlled them and their tribal property by acts of Congress instead of by treaties (*United States* v. *Kagama*, 118 U. S., 375, 379). And the purpose to control them by acts of Congress instead of by treaties was indicated by the act of March 3, 1871 (now Rev. Stats., sec. 2079).

Referring to that section the court, in the *Matter of Heff* (197 U. S., 488, 498), said: "From that time on the Indian tribes and the indi-

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vidual members thereof have been subject to the direct legislation of Congress, which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life."

Further, in commenting on the power of Congress in that same case, the court, quoting from the case of *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 565), said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

And after quoting numerous authorities in support of that holding and other authorities looking to the protection of the Indians, the court said: "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them."

Furthermore, in the case of the *Cherokee Nation* v. *Hitchcock* (187 U. S., 294) the court held, in effect, that Congress, by the act of June 28, 1898, "practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property." (See also *Delaware Indians* v. *Cherokee Nation*, 193 U. S., 127.)

To the same effect also is the case of *Wallace* v. *Adams* (204 U. S., 415) respecting citizenship in the Indian tribes.

In the case of *United States* v. *Rickert* (188 U. S., 432, 445), in commenting on the contention that the State had conferred upon the Indians the right of suffrage and for that reason they ought to share the burdens of taxation like other people, the court said: "These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attached to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress." And that case was quoted with approval in the case of *Matter of Heff* (197 U. S., 488, 497).

Again, in the case of *McKay* v. *Kalyton* (204 U. S., 458, 468), the court said: "The *Rickert* case settled that, as the necessary result of the legislation of Congress; the United States retained such control over allotments as was essential to cause the allotted land to enure during the period in which the land was to be held in trust 'for the sole use and benefit of the allottees.'"

It is due to the counsel for the claimants to say that we do not understand them as controverting the paramount authority of the United States over the tribal property of the Cherokees; but their contention is that as Congress conferred citizenship upon the Cherokees, and thereafter by the act of July 1, 1902, authorized the allotment and distribution of the common property as of September 1, 1902—to those living on that date—their right in and to the respective shares so authorized to be set apart thereby became vested as of September 1, 1902, and hence no tribal property remains upon which the act of April, 1906, as amended, can operate.

In this view of the case the act might be held valid, though inoperative to effect its purpose. But their further contention is that sec-

tion 2 of the act of April, 1906, seeks to deprive the Cherokee citizens enrolled as of September 1, 1902, of the vested rights acquired by them under the act of July 1, 1902, to their respective shares in all the common property, whether actually set apart as of September 1, 1902, or not; and in this respect no distinction is made between the lands so held and the money in the Treasury to the credit of the nation, though it is conceded that none of the money so held has been actually distributed, and that lands enough remain, if the act of 1906 is valid, to make allotments upon the basis already made under the act of 1902, to about 3,800 persons, leaving 2,810 persons who would receive $651.20 each out of the fund so held.

In the contention thus made the claimants of necessity divorce the Government from the control of the Indians and their property and place them upon an equality of rights with other citizens of the United States, although their tribal government, as provided by the act under which they claim, was not to cease until March 4, 1906.

We must assume that Congress had some purpose in keeping alive the tribal government until March 4, 1906, and by subsequent acts continuing the same in full force for all purposes under existing laws until all the lands of the nation and the funds to its credit shall have been allotted and distributed. By these acts the Government asserted its continued guardianship until the final distribution of the common property; and under the authorities cited we think it can not be successfully controverted that if before any allotments had been made under the act of 1902, Congress by amendment had inserted the date March 4, 1906, in lieu of September 1, 1902, allotments as of the latter date would have been valid and effective to bind all, as under the authorities cited, no rights could vest in severalty in communal property by the mere force of a statute. If they could, then, under the act of March 3, 1901, supra, they would have vested as of July 1, 1902, the date fixed by the Secretary of the Interior by authority of said act of 1901. But as before stated the case here proceeds upon the theory of the validity of the extension to September 1, 1902.

Under the authorities cited we do not believe rights became vested in the Cherokees until there was an actual severance of the communal property and the issuance of a patent, and then only to the extent of the property therein actually conveyed to the allottees pursuant to law.

Section 2, act of April 26, 1906, as amended, in terms applies only to minors living March 4, 1906, whose parents had been enrolled; and as all Cherokee citizens living on September 1, 1902, had been enrolled, it follows that the act applies only to minors born to such parents after September 1, 1902, who were living on March 4, 1906. In other words, the act of 1906 does not interfere with the roll or the allotments made under the act of 1902, but adds to the roll the minors so born to share equally with the allottees under said act—not to take from such allottees what has been set apart to them, but to apply the unallotted lands and undistributed funds so as to equalize allotments of persons on the final or extended roll as of March 4, 1906.

Our attention has been called to the case of Garfield, Secretary of the Interior, *v.* United States, ex relatione Goldsby, decided by the Supreme Court, November 30, 1908, wherein the name of Goldsby, a Chickasaw Indian who had received a certificate entitling him to a

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patent, had been stricken from the allotment roll without notice, and the court held that mandamus was the proper remedy to restore his name to the roll, as the Secretary of the Interior was required to perform a plain official duty requiring no exercise of discretion. Clearly this was right, as Goldsby was on the roll and had received a certificate of allotment, which, under section 23 of the act of July 1, 1902—under which he was enrolled—(32 Stat. L., 641), was declared to be conclusive evidence of his right to "the tract of land described therein."

In the present case certificates had been issued to the allottees, which, under section 21 of the act of July 1, 1902, respecting the Cherokees, were declared to be "conclusive evidence of the right of an allottee to the tract of land described therein," of which, under said section, they were entitled to be put in possession.

By sections 58 and 59 of said act the issuance of patents was provided for with the approval of the Secretary of the Interior; and assuming that the title to the tracts of land so described in the certificates became vested in the allottees severally it was, nevertheless, subject to the provisions of sections 14 and 15 prohibiting alienation thereof before the expiration of five years from the date of ratification of the act, and to section 72 against renting their allotments for grazing purposes for more than one year or for agricultural purposes for more than five years, except with the approval of the Secretary of the Interior, when such allotments may be leased for longer terms for either grazing, agricultural, or mineral purposes.

By section 11 of said act the Commission to the Five Civilized Tribes was not only limited in the allotments to "land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation," but section 18 of the act makes it unlawful, after ninety days from the date of ratification, "for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation;" and for any violation thereof he "shall be deemed guilty of a misdemeanor," punishable by fine of not less than $100 and "shall forfeit possession of any property in question."

While it may be that Congress at the time of the passage of the act intended to allot all the lands held by the Cherokee Nation except those reserved under section 24, still by section 72 of the act provision was made for the collection by the Secretary of the Interior of a reasonable grazing tax from the owners of cattle grazed "on lands not selected as allotments by citizens," and, too, for the benefit not of the allottees as of September 1, 1902, severally or collectively, but for the benefit of the tribe, which of necessity included all of its members then living. The act being silent as to the disposition of the unallotted lands, as the claimants concede, further legislation was necessary therefor—and this, also, the claimants concede; but they in effect say that Congress by the act of July 1, 1902, limited their power to allot such lands to any but the allottees under said act.

The omission in the act to provide for unallotted lands was supplied by section 16 of the act of April 26, 1906, which, in substance, provides for the sale of any unallotted lands and the payment of the proceeds thereof into the Treasury of the United States to the credit of the tribe.

Certainly Congress did not intend that rights should become vested in lands for the allotment or other disposition of which no provision was made in the act. Nor do we believe the language of the act of 1902 is susceptible of such construction. It may be inferred that Congress, by section 5 of the act of April 26, 1906, as amended, providing that patents or deeds to allottees should be recorded "and when so recorded shall convey legal title," thereby intended that allottees should acquire legal title only after the patents or deeds to them, respectively, had been recorded.

If the contention of the claimants is well founded then, by the act of July 1, 1902, the claimants, as citizens of the United States, acquired as against the United States vested rights to an equal share in all the lands held by the Cherokee Nation as of September 1, 1902; and if so, then the title in the Cherokee Nation was divested and merged in the several allottees, subject only to the execution of the muniments of title. But certainly it would not be contended that a mandamus would lie to compel an allotment of the remaining lands because, forsooth, Congress, while intending to make provision for the allotment of the lands to those living September 1, 1902, had failed. Statutes frequently fail of their purpose and further legislation becomes necessary; and if necessary, then it is for Congress, within their constitutional powers, to determine what that legislation shall be. Not that Congress have the power to take the land of one person and give it to another, but that among communal owners Congress may say when the lands so owned may be allotted, and may, for reasons satisfactory to them, of which they are the judge, extend the time for the allotment or disposition of the communal or tribal property so as to include all living on the date when the tribal government ceases.

When a citizen has acquired a right to the use and possession of property according to law, or when such right has become complete and consummated, requiring no further act to enable him to enjoy it, such right is within the protection of due process of law and therefore vested. That is to say, he has acquired a right in property which is enforceable in favor of a definite person. But conceding the application of the rule stated to the allottees in the land set apart to them under the act of July 1, 1902, it will not apply to the unallotted lands to which they have acquired no individual right of possession or enjoyment and therefore not within the protection of due process of law. In other words, the rights of said allottees under the act of July 1, 1902, in and to the unallotted lands after September 1, 1902, remained the same as they were before that date.

Assuming that the Cherokees by reason of the ratification by them of the act of July 1, 1902, thereby acquired contractual rights in and to the quantity of land therein authorized to be set apart, such rights can not be enlarged so as to include lands not allotted, and for which no provision was made. Therefore such lands remained subject to future legislation. Nor did the citizenship of the allottees deprive Congress of the right to control the remaining tribal property. (*Cherokee Nation* v. *Hitchcock*, supra.)

While the right to private property is a sacred right it has its limitations and restrictions. "It must have some regard to the general welfare and public policy; it can not be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds,

55 which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all." (Cooley's Constitution- Lim. 4th ed., p. 443.)

The rule there announced is applicable to the present case as the act of April 26, 1906, as amended, embraces the welfare of the whole tribe and seeks "the equal and impartial protection of the interests of all" in the common property until tribal relations cease. This is doing exact justice to all, and anything short of this would be a violation of the trust reposed in the Government in dealing with its dependent wards.

By the act of June 28, 1898, supra, respecting the Choctaws and Chickasaws, it was provided that when their tribal governments cease they "shall become possessed of all the rights and privileges of citizens of the United States," from which we conclude that Congress did not intend to surrender their power of control over tribal property so long as tribal relations existed. Furthermore, when such tribal relations do cease good faith requires that the Government shall not leave the Indian in the dark either as to his rights or the means by which such rights may be protected.

We deem it unnecessary to prolong the discussion, as under the authorities cited and the conclusions we have reached we must hold that the claimants acquired no vested rights in the allottable lands remaining after the allotments to them of the quantity specified in section 11 of the act of July 1, 1902, as no further provision is made therein for allotment of the remaining unallotted lands; and certainly no interest became completed in the remaining unallotted lands before the act of April 26, 1906, as amended, was passed; and therefore the claimants acquired no vested rights therein or rights the taking of which would be obnoxious to the fifth amendment of the Constitution. It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, we should, nevertheless, incline to resolve all doubt in favor of the validity of the statutes, leaving the Supreme Court to finally determine the question.

For the reasons we have given the petition is dismissed and judgment ordered for the defendants.

56 VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the fourth day of January 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee Citizens enrolled as such for allotment as of September 1, 1902, be, and the same is hereby dismissed.

BY THE COURT.

57 VIII. *Order of Court on Claimants' Motion for New Trial and Defendants' Motion for Amended Findings.*

On January 19, 1909 the claimants filed their motion for a rehearing, and on March 29, 1909 the defendants filed their motion for amended findings of fact.

On March 29 & 30, 1909 these motions were argued and submitted.

On June 10, 1909 the following order was filed by the Court:

*Order.*

The claimants' motion for a new trial is overruled.

The claimants' motion and the defendants' motion to amend findings are allowed in part and overuled in part, as shown by findings this day filed as of January 4, 1909. The judgment and opinion to stand.

Howry, J., withdraws his former opinion in part, and will file a substitute opinion before the allowance of any motion for an appeal.

BY THE COURT.

Filed June 10, 1909.

On June 10, 1909 Howry, J., filed the following opinion on the claimants' motion for a new trial:

*Opinion on Motion for New Trial.*

HOWRY, *Judge,* delivered the following opinion:

Since the reargument of this cause and a closer examination of the questions the doubts which have occurred to me respecting the validity of the legislation referred to the court for determination, will be stated with my conclusions, because I do not subscribe to everything the majority of the court have said, either in their original or revised opinion. My statement will at least show no want of reflection on the merits of the case.

I am free to state these doubts in my own way, because of the character of the act of our jurisdiction and because of the reasons which apparently led to its passage.

Ordinarily, every reasonable doubt respecting the constitutionality of statutes should be resolved by the courts in favor of the validity of such legislation. But the prompt action of Congress in acting upon

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the able report of one of their committees saying that the acts here complained of were not valid presents something different from the ordinary case coming before a court under the general rule stated.

Congress conferred upon the Cherokees subject to enrollment under the act of July 1, 1902, 32 Stat., 716, an undivided individual proportionate interest in the surplus lands and funds of the Cherokee Nation, so as to exclude all others from participation. The act was silent as to the *method of disposition* of those lands which should remain unallotted, but it expressly provided that if any person entitled to be enrolled should die subsequent to September 1, 1902 before receiving his allotment, the lands which would have been allotted to said person, if living, should be allotted in his name and should, "with his proportionate share of other tribal property," descend to his heirs, according to the laws of Arkansas. By the terms of the act it was provided that the scheme for all distributions should be submitted for ratification to the Cherokee people. The scheme was so submitted, and subsequently ratified by the Cherokees and proclaimed by the United States and the authorities of the Cherokee Nation in effect as final. The number of persons entitled to enrollment for the purposes of allotment and distribution on July 1, 1902, being unknown, it resulted that after allotment to the duly enrolled members in accordance with the provision of the act of July 1, 1902, lands remain undisposed of sufficient to provide over 3,000 allotments, of the present aggregate value of about $3,000,000.

Subsequently, by an act approved April 26, 1906, provision was made for the enrollment of Cherokees who were minors living on March 4, 1906, whose parents had been enrolled as members of the Cherokee and certain other tribes. Notwithstanding the inclusion of the minors of Cherokee parents in the words of this latter act, it was provided that such applications for enrollment should not be received where the date of filing applications had been fixed by agreement between any tribe and the United States; and, the date for determination of filing applications having been fixed as of October 31, 1902, by the agreement between the United States and the Cherokees, it is claimed that the provision of the act of April 26, 1906, did not apply to the Cherokees. But by the act of June 21, 1906, 34 Stat., 325, this act was amended so as to repeal this provision and to make the said act of April 26, 1906, in this particular, apply to the Cherokees. The contention of the claimants is that the act of April 26, 1906, as amended June 21, 1906, deprives petitioners and all others on whose behalf this suit is brought of their vested property rights in and to the lands and funds and other undivided property of the Cherokee people in violation of the constitutional provision that no person shall be deprived of his property without due process of law.

Notwithstanding that it was provided by the act of July 1, 1902, that no child born after said date to a citizen of the Cherokee Nation should be entitled to any allotment or participation in the tribal property, and that the roll made under the act as of September 1, 1902, when approved, should be final, the court has found that under the later legislation 5,610 minor children of enrolled Cherokee parents, born after September 1, 1902, and living on March 4, 1906, have been enrolled on separate lists as Cherokee citizens the same as those enrolled under the act of July 1, 1902.

which embrace the welfare of the whole community, and which secure the equal and impartial protection of the interests of all." (*Cooley Constitution Lim.* 4th ed., p. 443.)

The rule there announced is applicable to the present case as the act of April 26, 1906, as amended, embraces the welfare of the whole tribe and seeks "the equal and impartial protection of the interests of all" in the common property until tribal relations cease. This is doing exact justice to all, and anything short of this would be a violation of the trust reposed in the Government in dealing with its dependent wards.

By the act of June 28, 1898, supra, respecting the Choctaws and Chickasaws, it was provided that when their tribal governments cease they "shall become possessed of all the rights and privileges of citizens of the United States," from which we conclude that Congress did not intend to surrender their power of control over tribal property so long as tribal relations existed. Furthermore, when such tribal relations do cease good faith requires that the Government shall not leave the Indian in the dark either as to his rights or the means by which such rights may be protected.

We deem it unnecessary to prolong the discussion, as under the authorities cited and the conclusions we have reached we must hold that the claimants acquired no vested rights in the allottable lands remaining after the allotments to them of the quantity specified in section 11 of the act of July 1, 1902, as no further provision is made therein for allotment of the remaining unallotted lands; and certainly no interest became completed in the remaining unallotted lands before the act of April 26, 1906, as amended, was passed; and therefore the claimants acquired no vested rights therein or rights the taking of which would be obnoxious to the fifth amendment of the Constitution. It follows that we must hold that the act of April 26, 1906, as amended, is a valid statute, though we may add that if we entertained doubt, we should, nevertheless, incline to resolve all doubt in favor of the validity of the statutes, leaving the Supreme Court to finally determine the question.

For the reasons we have given the petition is dismissed and judgment ordered for the defendants.

OPINION ON MOTION FOR NEW TRIAL.

HOWRY, *Judge*, delivered the following opinion:

Since the reargument of this cause and a closer examination of the questions the doubts which have occurred to me respecting the validity of the legislation referred to the court for determination, will be stated with my conclusions, because I do not subscribe to everything the majority of the court have said, either in their original or revised opinion. My statement will at least show no want of reflection on the merits of the case.

I am free to state these doubts in my own way, because of the character of the act of our jurisdiction and because of the reasons which apparently led to its passage.

Ordinarily, every reasonable doubt respecting the constitutionality of statutes should be resolved by the courts in favor of the validity of such legislation. But the prompt action of Congress in acting upon

The eleventh and twelfth findings of the court show that the Cherokee national council authorized its principal chief to appoint a commission to represent the Cherokee Nation in the preparation of legislation for the final settlement of their affairs and the relations of the tribe with the United States; that a commission was appointed accompanied by a joint resolution of the national council of the Cherokee Nation to the effect that all children born since September 1, 1902, and prior to March 4, 1906, should be entitled to share equally with children born prior thereto in the lands and moneys as provided by the act of July 1, 1902. The thirteenth finding shows that by a conference between this commission and representatives of the Interior Department and the House and Senate Committees on Indian Affairs legislation ensued providing for the enrollment of minor children living on March 4, 1906, as hereinbefore stated.

The validity of the legislation under consideration must be determined without reference to those acts of the Cherokee council which resulted in the appointment of its committee to secure from the United States the enrollment of the after-born children.

The findings which show the methods employed to obtain the action of Congress are immaterial, because under section 2 of the amendments to Article I of the constitution of the Cherokee Nation the character of the title to the lands of the nation had been changed. That section provided that the lands of the nation should remain common property—that is, common property of the nation for the benefit of the tribe—*until the national council should request the survey and allotment of the same* in accordance with the provisions of article 20 of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation. The national council had already requested the survey and allotment of the lands in accordance with that treaty, and the request (having been submitted to the Cherokee people under a law of Congress to carry out treaties) had been ratified and the then existing controversy respecting the affairs of the tribe had been closed by a decision of this court, which was duly affirmed by the Supreme Court in the *Cherokee Intermarriage Cases*, 203 U. S., 93. Section 25 of the act of July 1, 1902, which imposed a limitation as to who should be enrolled exhausted the power of the Cherokee national council to make any further request in the premises. So any subsequent action of the council seeking to reverse the popular vote has nothing to do with this case.

The Cherokee lands had been before this act of July 1, 1902, conveyed to the Cherokee Nation in fee simple. *Holden* v. *Joy*, 17 Wall., 211. With the adoption of the Cherokee constitution the title to the common property passed from the communal owners and became vested in the nation as public lands and held by the nation in its political and corporate capacity for the whole tribe. *Whitmire's Case*, 30 C. Cls. R., 154; *Eastern Cherokees* v. *United States*, 40 C. Cls. R., 252; 202 U. S., 101. (See companion case of *Brown et al.* v. *United States*, 44 C. Cls. R.) So far then as the legislation had proceeded under the treaties by the act of July 1, 1902 (which professed to execute the treaties), the title to the unallotted lands and funds had passed out of the Cherokee Nation and had taken on the character, as to the persons authorized to be enrolled as of September 1, 1902, of an ownership in common for the benefit of all the members of the tribe living as of September 1, 1902.

Aside from the want of authority of the Cherokee council to pass any resolution which could bind the individuals declared by law to be entitled to the unallotted lands and funds, the resolution was ineffective for the want of approval by the President (30 Stat., 84; 31 *ibid.*, 1077); nor can we assume that any request emanating from the Cherokee council led Congress to take from the enrolled Cherokees the property which the act of July 1, 1902, attempted to give to them, because the act of April 26, 1906, excluded the Cherokees from its operation. Though the amendment of June 21, 1906, did in terms make the obnoxious legislation applicable to the undistributed lands and funds of the Cherokee citizens there is nothing to show any agreement between the Cherokee council and Congress which led to that amendment.

The ultimate question for determination is whether the lands and funds not allotted became the private, personal property of those citizens of the United States yet known as Cherokees living at the time fixed for final enrollment and their heirs as tenants in common. That is, whether the unallotted lands and funds remained in the hands of the United States as trustee to distribute among the aforesaid *cestuis que* trust named as such by a law formally approved by the contracting parties, or became the subject of other and different disposition according to the will of Congress.

The majority of the court reason that the act of April 26, 1906, as amended, is valid because that legislation "embraces the welfare of the whole tribe" under a rule which seeks the equal and impartial protection of the interests of all in the common property until tribal relations shall cease. It does not, however, seem to me that such a rule (merely of welfare) can be invoked, because this is not a matter of expediency or of sentiment, but one of right claimed on the one side and denied on the other under an alleged contract made by and for persons living September 1, 1902. And if it be true, as stated at the argument (and not denied), that three-fifths of the after-born children were of white parentage the welfare of the whole tribe—certainly not of the full-bloods—is not established.

Incidentally the white parents of three-fifths of the new class might profit, while those to whom no children were born subsequent to the contract would receive no benefit.

Nor in the attempt to equalize 3,800 allotments among a new class numbering 5,610 it must not be overlooked that (if the matter of welfare is to be considered) it is only the rights and not the convenience and advantage of the after-born children which can be considered.

This court recently decided under a special act that conferred jurisdiction and under which 1,200 colored people shared in the distribution of certain Cherokee funds but were denied admission to the rolls under this allotment scheme (their rights probably being the same), that the court would retain a cause which those persons had instituted, to see that complete justice should be done to all such claimants whose names do not now appear on the rolls. *Whitmire, Trustee*, v. *United States*, 44 C. Cls.

All this, however, is beside the real question.

The joint resolution of March 2, 1906, continued the existence of the governments of the civilized tribes *under existing laws* until all

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property should be distributed. The claimants contend that this surplus remained in the hands of the United States as trustee to distribute among those whom the United States had recognized by law as owners of the property in carrying out the treaties of the Government with the Cherokees.

Some state decisions are referred to in support of the contention. Thus, in *Drew* v. *Carroll*, 28 N. E. (Mass.), 148, a statute was considered by the supreme court of Massachusetts which made all Indians citizens of the State and gave the right to the Herring Pond Indians to have partition of their common land to be afterwards divided; and where a scheme of allotment through state officers was provided in the act it was held that immediately upon their being made citizens each Indian acquired an undivided right, title, and interest in the lands, which he could mortgage even before partition was had.

In *Webster* v. *Reid*, 1 Morris (Iowa), 615, where certain half-breeds of the Sac and Fox tribes held fee simple title as tenants in common, it was held that the legislature had not the power to destroy vested rights, although it might create or augment them. This case was followed by that of *Wright* v. *Marsh*, 2 Green (Iowa), 94, where it was held that no feature of an act could be considered as valid or effectual which would have a tendency to destroy, or even impair, vested rights.

If the act of July 1, 1902, was an agreement with the members of the Cherokee tribe, and such members were citizens of the United States, there is great force in the argument that each member of the tribe living September 1, 1902, acquired an undivided interest in the common lands, free from any right of change, because the future distribution of that property was designed to be ministerial in character; and the exercise of further plenary power on the part of the Government was not intended except for the benefit of those embraced in the ratified agreement.

The further contention that when citizenship was conferred there was no tribe is likewise of much force. The Cherokee government remained, but the tribal right of control of the land had gone out of that government for the benefit of individuals. Indian courts had been abolished, and the members of the tribe had practically assimilated such rights as all other citizens enjoyed.

The majority of the court is of opinion that "the rights of said allottees under the act of July 1, 1902, in and to the unallotted lands after September 1, 1902, remained the same as they were before that date." Petitioners and persons associated with them were the exclusive owners at the time mentioned, with the right ultimately under treaties to have an equal share of the common property whenever the time might be agreed upon. This right did not depend wholly upon the act of July 1, 1902, but was primarily dependent (the United States consenting) upon a law of the Cherokees as well fixed and settled as the laws of descent and distribution elsewhere. It is a contradiction to say that under the new legislation the rights of the allottees fixed by the act of July 1, 1902, remained the same in and to the unallotted lands if a new class numbering 5,610 people be admitted, because the new class must necessarily absorb every piece of unallotted land and to make this new class equal nearly all the available funds must likewise be absorbed for the benefit of the new class. Thus, the rights of the former allottees are in effect superseded and

are therefore no rights at all if the Congress have the power to take land and moneys from the old class to give to the new.

Prior to September 1, 1902, the Cherokees were entitled to claim as communal owners, but after that date they were equitable owners free from Cherokee national control. And the Cherokee agreement said that no child born after September 1, 1902, should be born into the right and that no person dying after that date should die out of the right. By the act of July 1, 1902, Congress recognized the prerogative of the Cherokees to change the character of their title from communal to common. The Cherokees adopted the change, and we have seen, according to the decision of the Supreme Court, that both parties to the agreement gave their formal consent.

From the foregoing it will be seen that there is great reason to doubt the validity of the legislation which forms the subject-matter of the petitioners' complaint. Generally speaking, any estate, property, or interest is called "vested," whether in possession or not, which is not subject to any condition precedent and unperformed. The interest may be either a present and immediate interest, or it may be a future but uncontingent, and therefore transmissible, interest. A vested estate in possession is a term applying to a right of present enjoyment actually existing.

In constitutional law vested rights are those which have so completely or definitively accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the Government should recognize and protect as being lawful in themselves, and settled according to the then current rules of law, and of which the individual can not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Black's L. Dic., 1218.

Notwithstanding that the act of July 1, 1902, was a promise in redemption of treaty agreements, the legal title to the unallotted lands—accompanied by possession—is not yet in a single individual living as of September 1, 1902. In *Stephens* v. *Cherokee Nation*, 174 U. S., 445 (which was predicated upon the ruling in *Choctaw Nation* v. *United States*, 119 U. S., 27), the determination of membership in a tribe was reserved by the government for the purpose of adjusting all rights in the tribal property. That case in effect and generally holds as to unallotted lands and undistributed moneys that such lands and moneys remained public lands and public moneys *until* held in individual ownership. The court there said that "The assertion by any particular applicant that his right therein is so vested as to preclude inquiry *into his status* involves a contradiction in terms." But that expression related to those who were claiming as entitled but whose right as a member was the subject of investigation by lawful authority. The scope of the decision was, however, that Congress could legislate if the subject of the legislation related to tribal property. The act under consideration in that case was spoken of as correlative legislation which related to the determination of membership in the tribes for the purpose of adjusting rights in the tribal property. The court *declined to intimate any opinion as to the effect of changes* made by the subsequent legislation or by the agreements mentioned as

having been made, respecting the "status" of the petitioners. In *Cherokee Nation* v. *Hitchcock*, 187 U. S., 307, title remained in the tribe and did not vest in the individuals although held by the tribe for the common use and equal benefit of all the members; and in that respect the correlative legislation like that in the Stephens case, *ante*, related to the determination of membership in the tribe for the purpose of adjusting the property right. In the Hitchcock case the court adverted to the case of *Cherokee Trust Funds*, 117 U. S., 288, where it was said that whatever title the Indians had was in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. The Hitchcock case rested further administrative control upon the statement that the lands and moneys involved *were public lands and public moneys where treaties had not evinced any intention upon the part of the Government to discharge the beneficiaries from their condition of pupilage or dependency.*

Following these decisions came the case of *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, which dealt with an act passed at a time when the tribal relations between certain confederated tribes still existed and where the original statutes and the statutes supplementary thereto dealt with the disposition of property undoubtedly tribal, in which the court said that administrative control continued at least *so far as tribal lands were concerned.*

It was competent for Congress to provide by additional legislation for the verification of the rolls directed to be prepared so that only those persons possessing the necessary qualifications should receive anything.

Whether it was competent to admit another and different class by later legislation depends upon the character of the title and the relation of the property to the members of the tribe. In a sense the unallotted lands were not tribal lands after September 1, 1902, because the tribal interest theretofore held by the nation had passed to a class with a common individual right with such an interest in the land as that death could and did terminate as to the person dying, but transmissible to an heir and yet made the subject of partition by the agencies of the government for the benefit of those living and the heirs of those dying. The right being transmissible to heirs, and inheritable by those entitled to share by virtue of parentage it would seem that the continued existence of the Cherokee government was solely for the purpose of enabling the United States, in cooperation with the Indian government, to carry out the scheme. If the existence of the Cherokee government June 21, 1906, gave 5,610 infants living on March 4, 1906, the right to participate and yet excluded those born since the last-mentioned date up to the period of final allotment, we find an unequal distribution at last because of the continuation of the Cherokee *government* to a later date. Consequently, those born since the 4th of March, 1906, may even now be admitted to share if the act of 1906 is a valid statute.

The contention that the act of July 1, 1902, took from the unallotted lands the character of tribal lands is not without force, because that act evinced a clear intention to carry out treaty agreements by definitively providing for certain individuals to be enrolled as tenants in common. In *Delaware Indians* v. *Cherokee Nation*, 193 U. S.,

127, Mr. Justice Day declared, on the authority of the *Cherokee Trust Funds case*, 17 U. S., 308, that the lands of the Cherokees *then* belonged to the nation as a political body and not to the individual members of the tribe. But in speaking of the rights of individual Cherokees *as matters then stood*, it was said that each Cherokee "had a right to use parcels of the lands thus held by the nation, subject to such rules as its governing authority might prescribe." In *Eastern Cherokees* v. *Cherokee Nation* et al., 202 U. S., 101, Mr. Chief Justice Fuller also dealt with the matter of Cherokee title in its then condition and stated that the Cherokee government was trustee for all of its people. In the *Cherokee Intermarriage cases*, 203 U. S., 76, from which decisions this litigation sprang (inasmuch as large numbers of the intermarried whites were declared not entitled to participate, thereby leaving an excess of unallotted land), it was said that the amendments of 1866, article 1, section 2, of the treaty declared that the lands of the Cherokee Nation should remain common property, title being in the nation, *until* the national council should request the survey and allotment of the same pursuant to the treaty of July 19, 1866. As the request of the national council was duly made, it can not be denied that the new legislation was framed in disregard of the amendment to that treaty. In fact, the terms of those agreements were broken by the legislation which admitted a class not sanctioned by the whole body of people in actual interest.

Without speculating further upon the nature of the Cherokee title (a full exposition of which may be found in *Whitmire's case*, 30 C. Cls. R., 148, and *Cherokee Nation* v. *Journeycake*, 155 U. S., 196), and the changes made by the agreement resulting from the action of the Cherokee government and the United States it is apparent that though the subsequent legislation admits a new class the unallotted lands are in a sense yet tribal. They belong to Cherokees but have not been reduced to possession. There is yet no right in severalty free from some administrative control by the United States, true though it is the unallotted lands do not seem to be subject to the further operation of the Cherokee constitution, because the title passed out of the nation so far as the ratified agreement could have that effect.

The new class provided by the later and amended legislation can participate only upon the theory that notwithstanding the tribe had elected for a specific division among those living September 1, 1902, it was competent to admit the newly born people because those provided for by the act of July 1, 1902, had not come into the possession as individuals of the property proposed to be given to them in final form. The body of unallotted lands was and is yet a public-trust estate for the benefit of Cherokee Indians even though such Indians have been invested with the status of citizenship. The lands and moneys in controversy being yet public lands and public moneys and no certificate or patent having issued to fix the private right in severalty, it is probably safest to say that the political power of the Government to deal with the unallotted lands and make final disposition of all the undistributed property has been properly exercised.

Whilst not unmindful of the suggestion that the individual members of the tribe enrolled as of September, 1902, and their heirs became as much entitled to the surplus lands and undistributed funds as to the lands allotted and confirmed by patents and possession, this court

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must conform as near as may be to what the supreme authority has indicated with respect to administrative control where Indian lands are yet undivided and tribal. True, none of the cases cited present the exact question presented here because the nature of the compact disclosed by this record makes the circumstances different.

But the Indian interest in the unallotted property was not an enforcible interest in the courts, and until Congress completed the scheme by making the final distributions in the Government's own way the equitable owners were remediless. When the political authority saw fit to change the supposed fundamental agreement by incorporating new beneficiaries before the actual dissolution of the tribe, the courts apparently were not at liberty to interfere.

As to the allotted lands, title vested in fee simple as to every tract surrendered. The guardianship of the Government over the Indian's exclusive control and possession of land conferred by patent no longer existed. The United States could exercise no control because the trust relationship had ceased to exist. Every individual holding by patent obtained a vested right in fee from the Cherokee Nation by and with the consent and cooperation of the United States, which, in the words of the Supreme Court, "can not be divested by any subsequent act of Congress or by the executive departments." 175 U. S., 19–21.

In the doubt growing out of the interpretation to be given to what the court of last resort has said with respect to that which is or may not be tribal property I am unwilling now to say that the legislation which provides for the after-born children to participate in the surplus property is unconstitutional, and therefore invalid. Accordingly, I concur in the result that the petition be dismissed.

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66 IX. *Application for, and Allowance of, Appeal.*

In this cause come the petitioners by attorney and pray an appeal to the Supreme Court of the United States from the judgment of this court entered on the 4th day of January 1909.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
*Attorneys for Petitioners.*

Filed August 27, 1909.

Ordered: That the above appeal be allowed as prayed for.

STANTON J. PEELLE,
*Chief Justice.*

August 28, 1909.

67 In the Court of Claims.

No. 29986.

DAVID MUSKRAT and J. HENRY DICK, on Their Own Behalf and on Behalf of all Cherokee Citizens Enrolled as Such for Allotment as of September 1, 1902,

vs.

THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusions of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the order of the Court on the motion of the claimants for re-hearing and of the defendants for amended findings of fact; of the opinion of Howry, J., on said motion for new trial; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of September, 1909.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

Endorsed on cover: File No. 21,829. Court of Claims. Term No. 330. David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, appellants, vs. The United States. Filed September 20th, 1909. File No. 21,829.

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

DAVID MUSKRAT AND J. HENRY DICK, ON their own behalf, etc., appellants,
*v.*
THE UNITED STATES.
} No. 330.

*APPEAL FROM THE COURT OF CLAIMS.*

**MOTION TO ADVANCE.**

On behalf of the United States, the Attorney-General respectfully moves the court to advance the above-entitled cause for hearing immediately after the cases of *Marchie Tiger* v. *The Western Investment Company et al.*, No. 60, and *William Brown and Levi B. Gritts, on their own behalf, etc., appellants*, v. *The United States*, No. 331, for the following reasons:

(1) Recently, on the motion of the Attorney-General, this court postponed the latter case for hearing with the former, having previously advanced it for hearing at the beginning of this term.

(2) The *Tiger* and *Brown* and *Gritts* cases involve the validity of recent legislation concerning the Five Civilized Tribes in so far as it attempts to extend restrictions previously imposed upon the alienation of allotted lands by full-blood Indians of said tribes, while the present case is a suit specially authorized

to be brought against the United States by the act of March 1, 1907 (c. 2285, 34 Stat., 1015, 1028), to determine the validity of said legislation in so far as it attempts to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date previously fixed by Congress for closing the roll.

(3) The act of March 1, 1907 (c. 2285, 34 Stat., 1015, 1028), expressly provides that for the speedy determination of the questions involved in the present case and the *Brown* and *Gritts* case, precedence shall be given to them by the courts and by the Attorney-General.

(4) In all three cases the Indians concerned are members of the Five Civilized Tribes whose status and relation to the United States are pertinent and are to be determined by an examination of substantially the same legislation.

(5) The present case, therefore, although it involves questions peculiar to itself, nevertheless has so much in common with the *Brown* and *Gritts* and *Marchie Tiger* cases that it will conserve the convenience and time of the court if it be advanced for hearing immediately after said cases.

Notice of this motion has been served upon opposing counsel, and they concur therein.

GEORGE W. WICKERSHAM,
*Attorney-General.*

OCTOBER, 1910.

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IN THE

# Supreme Court of the United States.

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**No. 663.**

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DAVID MUSKRAT and J. HENRY DICK, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, *Appellants*,

*vs.*

THE UNITED STATES.

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## Motion to Advance for Hearing.

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Come now the appellants and move this Honorable Court to advance this cause for hearing, for the following reasons, to wit:

1. The action is brought to deny the power of Congress to dispose of unallotted lands comprising a part of the former Cherokee domain, aggregating about 380,000 acres estimated to be of the value of $10 to $20 per acre, and of former Cherokee funds now in the Treasury of the United States, aggregating about $1,300,000, to a class of persons not contemplated in the Act of Congress of July 1, 1902 (32 Stat. L., p. 716), known as the Cherokee Allotment Act.

2. The constitutionality of the act of June 21, 1906 (34 Stat. L., 1908), amending the act of April 26, 1906, is attacked as being one which deprives the enrolled Cherokees, citizens of Oklahoma, known as Cherokee allottees, of property of great value, without due process of law.

3. If the decision of the inferior court be reversed, further legislation will be necessary to effect the final disposition of the lands remaining unallotted; and the large sum of money remainiug in the Treasury can, and probably will, be disbursed to the enrolled Cherokees, the condition of many of whom is one of abject poverty.

If the decision be affirmed, about six thousand unenrolled and unallotted Cherokees will receive

said lands and money within a comparatively short time.

A decision modifying the decree might be rendered which would affect advantageously both the appellants and the class of persons for whom the United States appears as defendant.

The desire of Congress to have a speedy judicial determination of the questions involved appears from the authority given in the jurisdictional act herein to ask the advancement of the cause, as will appear from its terms, as follows:

> "That * * * David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee ctiizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, so far as said acts, or any of them, attempt * * * to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two.
>
> "And jurisdiction is hereby conferred upon the Court of Claims, with the right

of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts and by the Attorney-General, who is hereby charged with the defense of said suits." (34 Stat. L., 1015, 28.)

Respectfully submitted,

WILLIAM H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
*Attorneys for Appellants.*

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 326

DAVID MUNGRAS, Jr., ROBERT [illegible], as Trustees of the Property of Burlington Transportation Company, Debtor, Appellants, a Corporation,

v.

THE UNITED STATES

STATEMENT AND BRIEF ON BEHALF OF APPELLANTS

[illegible]

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 330.

DAVID MUSKRAT AND J. HENRY DICK, ON THEIR OWN BEHALF AND ON BEHALF OF ALL CHEROKEE CITIZENS ENROLLED AS SUCH FOR ALLOTMENT AS OF SEPTEMBER 1, 1902,

*vs.*

THE UNITED STATES.

## STATEMENT AND BRIEF IN BEHALF OF APPELLANTS.

This cause is pending in this honorable court on appeal from the judgment of the Court of Claims dismissing the petition.

The action in the Court of Claims was brought under an act of Congress (Appendix A) authorizing the petitioners, on their own behalf, and on behalf of all Cherokee citizens enrolled for allotment as of September 1, 1902, to determine the validity of any acts of Congress passed since July 1, 1902 (Appendix B), so far as such acts seek to increase the number of persons entitled to share in the final distribution of the lands and funds of the Cherokees, beyond the number provided for in the original allotment act of July 1, 1902.

This jurisdictional act provided also an appeal to this court (Rec., 22).

The act of July 1, 1902 (32 Stat. L., 716, sec. 26), which may be called the allotment act, applicable solely to the Cherokees, provided that the final roll of the Cherokees should be made as of September 1, 1902, and that none who should die before, and none who should be born after, that date should be entitled to enrollment or to participation in the distribution of the tribal property (sec. 26, Rec., 21). The roll thus prepared was to be approved by the Secretary of the Interior, and to persons so enrolled allotments of land were to be made, patents therefor issued, and the funds in the United States Treasury distributed pro rata (secs. 66, 67, Rec., 4). By the acceptance of a patent for the lands allotted to him, the allottee was declared to assent to the allotment and the conveyance of all other lands allotted to enrolled Cherokees, and to relinquish all his right, title, and interest in the same. This provision as to relinquishment did not extend to the allottee's interest in the lands specifically reserved from allotment, or their proceeds, nor to any other of the lands except those actually allotted in accordance with the act (sec. 60, Rec., 3).

The lands reserved from allotment comprise those upon which the public buildings of the former Cherokee Nation had been erected, or to which some public interest attached, as, for instance, the Capitol, printing office, schools, insane and orphan asylums and town sites (sec. 24).

As to the tribal funds, the Secretary of the Interior was, after paying the tribal indebtedness, to distribute them pro rata among those enrolled in accordance with the allotment act (secs. 29, 66, and 67). This allotment act provided in terms that it was not to become effective until ratified by a majority of the legal voters of the Cherokee tribe, after which it was to be proclaimed by the Principal Chief and by the Dawes Commission. It was submitted

to a popular vote, ratified by a majority and duly proclaimed (Finding VII, Rec. 20).

Proceeding under the authority of the act, the roll was prepared, containing the names of 37,561 persons, to whom allotments of land were duly made and patents issued. After making these allotments there yet remain lands sufficient to provide about 3,800 allotments, worth $2,500,000, and of the funds in the Treasury about $2,000,000 remain undistributed (Finding VIII, Rec. 21).

The appellants, Muskrat and Dick, were duly enrolled under the act, and have received their allotments of land (stipulation).

On April 26, 1906 (Appendix A), Congress passed an act (34 Stat. L., 137), authorizing the enrollment of minor children living on March 4, 1906, born to parents of the Five Civilized Tribes who had been previously enrolled as members of the several tribes. Notwithstanding the inclusion of minor children of Cherokee parents by the terms of this latter act, there was a proviso that applications for enrollment should not be received from any person where the date for filing applications had been fixed by agreement between his tribe and the United States; and, the date for determining the filing of applications having been fixed by agreement with the Cherokees as October 31, 1902, the Cherokees were, therefore, exempted from the operation of the act. But by an act of June 21, 1906 (34 Stat., 325), this act was amended so as to repeal this proviso and to make the act of April 26, 1906, in this particular, apply also to the Cherokees; so that the act of April 26, 1906, as amended by the act of June 21, 1906, provides for the enrollment of minor children born to enrolled Cherokees after September 1, 1902, and for allotment to them out of the lands remaining subject to allotment (Finding IX, Rec., 21). It is further provided by this act that if there be not lands sufficient to allot all Cherokees who had been, or should be, enrolled, then each person not receiving

an allotment of land shall be paid double the value thereof out of the Cherokee fund in the United States Treasury (sec. 2). The value of an allotment had been previously fixed by the Dawes Commission, under the authority of the original allotment act, at $325.60 (Finding VIII, Rec., 21). Proceeding under this act of April 26, 1906, as amended, the Secretary of the Interior enrolled 5,610 minor children born after September 1, 1902, and living March 4, 1906 (Finding IX, Rec., 21). This number largely exceeds the number of allotments, 3,800, so that more than 1,800 of these minor children will, if the act be sustained, receive $651.20 each out of the funds in the Treasury.

The appellants assert that under the original allotment act all Cherokees living on September 1, 1902, and enrolled as of that date, became vested, as individuals, with indefeasible estates of inheritance, share and share alike, in and to all the Cherokee funds which were then in, or should thereafter come into, the United States Treasury, less such amounts as should be paid out under the authority of said act, and in and to all the Cherokee lands, either in kind or the proceeds thereof if thereafter sold; that the act of April 26, 1906, unamended, provided the desired administrative machinery, with authority and instructions in detail, to make physical delivery of said estates to each Cherokee enrolled as of September 1, 1902; that the act of April 26, 1906 did not provide for enrollment of Cherokee children born after September 1, 1902, but expressly to the contrary (Sec. 2, proviso); but the act of June 21, 1906, undertakes to amend section 2 of the act of April 26, 1906, by repealing the proviso which had made said section 2 inapplicable to the Cherokees, and by such act would deprive appellants and all Cherokees enrolled as of September 1, 1902, of the equivalent of 5,610 of their individual shares of said Cherokee lands and funds, without due process of law, without compensation and for private use.

Prior to the passage of the act establishing this jurisdic-

tion the petitioners, and others having like interests, instituted a suit in the Supreme Court of the District of Columbia, seeking to enjoin the Secretary of the Interior from proceeding with the allotment of lands and the payment of moneys to the minor children born after September 1, 1902. Soon afterwards Congress passed this jurisdictional act, and no further proceedings were had in the injunction suit (Finding [illegible]Rec., 22). Whereupon this suit was brought, and the Court of Claims found adversely to the petitioners, holding that the acts referred to were not violative of any provision of the Constitution. Hence this appeal.

From the findings of fact was omitted the following, which, being stipulated in the court below, is the subject of a stipulation filed in this court:

> "The petitioners are enrolled as members of the Cherokee tribe, residents of that part of the State of Oklahoma, formerly Indian Territory, and are the identical persons named in the act of Congress of March 1, 1907 (34 Stat. L., 1028), conferring jurisdiction upon this court to hear and determine this suit. They have received allotments of both homestead and surplus lands under the provisions of the allotment act of July 1, 1902" (32 Stat. L., 716).

In this statement we have omitted reference to certain findings of fact, for reasons now given:

Finding I is not a finding of fact, but a conclusion of law practically embodied in the second and third conclusions of law (Rec., 25). Findings II, III, and IV are not material, except in so far as they show that the Dawes Commission was charged with the preparation of the roll. Finding VI (Rec., 20) is stated only so far as it shows the roll to have been prepared by the Dawes Commission.

That this Commission "began making a roll of citizens of the Cherokee Nation under the act of June, 1898, and was engaged in the making of said roll" when certain other acts, including that of July 1, 1902, were passed, is mislead-

ing in the conclusion that may be drawn from it that the roll directed to be made by the act of July 1, 1902, was begun under an act passed *four years before that date,* for manifestly if the act of July 1, 1902, directed the preparation of a roll, making conditions not included in previous acts directing the preparation of rolls, proceedings toward that end must have been begun and terminated after July 1, 1902. The act of July 1, 1902, contained the condition for the first time that only those should be enrolled who were living on September 1, 1902. Other conditions prescribed by the acts directing the preparation of a roll being the same, it is a reasonable assumption that the names placed upon the roll under previous acts were transferred to the roll made under the act of July 1, 1902, if such persons were living on September 1.

The objection to Finding IX (Rec., 21) goes to the statement that the time for the completion of the final roll *"was extended or supplemented"* by permitting the enrollment of children who were minors living on March 4, 1906. The statement is misleading.

The act of July 1, 1902, fixed no time for the completion of the final roll. It fixed the date on which Cherokees must be living in order to be enrolled, namely, September 1, 1902, and it fixed the date after which applications for enrollment would not be received, namely, October 31, 1902.

The act of April 26, 1906, made applicable to the Cherokees by the act of June 21, 1906, did not have in contemplation those persons who were entitled to be enrolled as of September 1, 1902. It provided for minor children not enrolled as of September 1, 1902, who should be living on March 4, 1906; and it fixed a time in which the Secretary of the Interior should complete the making of the actual roll of such minor children, namely, March 4, 1907. It in nowise sought to "extend" or "supplement" the roll of September 1, 1902.

The objection to findings XI, XII, and XIII (Rec., 23, 24) is that they are immaterial in the ultimate fact they

seek to establish, namely, that the enrollment of children born after September 1, 1902, and living on March 4, 1906, was procured by the Cherokee national authorities. These findings will, however, be discussed in the brief.

Objection is made to the last paragraph of finding XV (Rec., 25), in that it omits one very significant provision of the act of April 26, 1906, respecting the continuance of the tribal government, which provision is of course open for this court to read. That provision is that the tribal existence of the Cherokees is continued in full force and effect "*for all purposes authorized by law* until otherwise provided by law." The finding omits the words italicised in the foregoing sentence.

Upon these findings the court decided, as conclusions of law, that when the original allotment act was passed, the petitioners and all other members of the Cherokee Nation of Indians were citizens of the United States, as also are the children subsequently born to them; that the Cherokee Nation is and always has been recognized by the United States as a distinct political community, subject only to the paramount authority of the United States; that the tribe and present tribal government of the Cherokee Nation were existing when the acts of April 26 and June 21, 1906, were passed; that no citizen of the Cherokee Nation has any vested interest in its unallotted lands or its undistributed funds; that section 2 of the act of April 26 was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council of the Cherokee Nation, with the approval of the President of the United States, as shown in the findings XI, XII, and XIII (to which we have hereinbefore referred as immaterial to the issues); that Congress has plenary power to administer upon the tribal property of the Cherokee Nation, and that the courts may not interfere with such administration; that the provision of the acts authorizing the

enrollment of minor children born after September 1, 1902, and living on March 4, 1906, is not repugnant to the constitution, and that minor children so enrolled are entitled to participate in the allotment of lands and the distribution of funds, in the same manner, and to the same extent, as Cherokee citizens enrolled under previous acts of 1898, 1900, and 1902 (Rec., 25, 26).

## Specification of Errors.

The Court of Claims erred—

1. In its conclusion of law (3) that the Cherokee tribe and the present tribal government of the Cherokee Nation were existing at the date of the passage of the acts of April 26 and June 21, 1906, "as set forth in finding XV";

2. In its conclusion of law (4) that no citizen of the Cherokee Nation has any vested interest in its unallotted lands or undistributed funds;

3. In its conclusion of law (5) that the legislation complained of was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation as instructed by the National Council, with the approval of the President of the United States, and is therefore valid;

4. In its conclusion of law (6) in so far as it declares the property involved in this litigation to be "the tribal property of the Cherokee Nation" over which Congress had plenary power;

5. In its conclusion of law (7) that the act of April 26, 1906, as amended, authorizing the enrollment of minor children born after September 1, 1902, and living on March

4, 1906, and their participation in the allotment of lands and distribution of Cherokee funds "in the same manner and to the same extent as Cherokee citizens enrolled under the acts of 1898, 1900, and July 1, 1902," is a valid statute.

6. In dismissing the petition.

The court further erred—

7. In the conclusion necessarily involved in the sixth conclusion of law, that if the lands and funds in question were tribal property they were held for the benefit of *a part of the tribe,* namely, the minor children born after September 1, 1902, and living on March 4, 1906, and not for all the members of the tribe who may be living when final distribution is made.

8. In not holding that the act of June 21, 1906, seeking to add to the number of Cherokees who should share in the distribution of said property, effected the taking of appellants' property without due process of law and for private use.

There are other errors consequent upon or included in these to which reference will be made in the argument.

These several formal specifications of error present for determination these questions:

1. Did the Cherokee Tribe and the Cherokee Tribal Government exist on July 1, 1902

2. If so, for what purpose was the existence of the tribe and of the tribal government continued, and what effect did such a continuance have, if any, as affecting the unallotted lands and undistributed funds?

The answer to this question will dispose of assignments one and three.

3. Did the acts of July 1, 1902 and April 26, 1906 (unamended), vest appellants with such right or title in and to all the Cherokee lands and funds as could not be taken or destroyed without due process of law?

Or, are the lands and funds not allotted or distributed tribal property over which Congress has the absolute power of disposition? Specifications 2, 4, and 5.

4. If the unallotted lands and undistributed funds are tribal property, is it within the power of Congress to distribute such property to a particular class of such tribe—the after-born children? Or must it not be distributed among all the members of the tribe? In this connection,—who are the members of the tribe? Specification 7.

5. Is not the act of June 21, 1906, repealing that provision of the act of April 26, 1906 which exempted the Cherokees from its operation, violative of the due process clause of the fifth amendment to the Constitution? Specifications 5 and 8.

The court will observe that the court below permitted the Cherokee Nation to intervene through an attorney claiming to represent them, and to oppose the contention of appellants. Objection to the intervention of the "Cherokee Nation" was duly made and overruled. We have not formally assigned the overruling of this objection as error, because it is merely incidental and does not go to the substance of the controversy. It is mentioned now, that we may demonstrate that the "Cherokee Nation" has no interest whatever in the controversy and is not entitled to any consideration. This is apparent from three conditions:

First. The act directs that the United States be made defendant and does not provide for any other defendant.

Second. The Cherokee Nation, as a government or a tribe, had ceased to exist.

Third. No interests of the "Cherokee Nation" are sought to be affected.

Fourth. It is impossible that counsel for the so-called "Cherokee Nation" can, in opposing the contention of appellants, represent the Cherokee people, since there are but 5,610 minor children, and could not be more than double this number of parents, while there are at least twenty-five thousand other Cherokees that will inevitably suffer great loss of property if the validity of this legislation be sustained.

## BRIEF OF ARGUMENT.

**The Cherokee Tribe and Cherokee Tribal Government had ceased to exist long before March 2, 1906. But, even so, the joint resolution of March 2, 1902, and section 28 of the act of April 26, 1906, purport to continue the existence of the tribe and of the government only for "all purposes authorized by law."**

**There was no law authorizing the Cherokee government to make, or to request Congress to make, such disposition of Cherokee property.**

The court, in its conclusions of law on this subject, refers to its Finding of Fact XV, in which are recited the resolution of March 2, 1906, and section 28 of the act of April 26, 1906, which undertook to continue the tribal existence and the tribal government "for all purposes authorized by law" (Rec., 25). What those purposes were is easily ascertainable.

The act of June 28, 1898 (30 Stat. L., 495, 502), provides, in its 19th section, "that no payment of moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payment of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual," etc.

By section 28 of the same act (page 504) it is provided that on the first day of July, 1898, all tribal courts in Indian Territory shall be abolished, and no officer in said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be trans-

ferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit.

By section 26, p. 504, of the same act it is provided:

> "That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory."

By the act of March 3, 1901 (31 Stat. L., 1058, 1077), it is declared:

> "That no act, ordinance, or resolution of the Creek or Cherokee tribes, except for adjournment, shall be of any validity *until approved by the President of the United States.*"

We submit that by these several statutes the following results were accomplished:

First. The incapacity of the tribe to receive or disburse any funds, thus dispensing with the Cherokee national treasury.

Second. The abolishment of the Cherokee courts, thus destroying its judiciary and its constabulary.

Third. The destruction of the Cherokee code of laws, by the provision that none of them should be enforced by the courts of the United States in the Indian Territory.

The Cherokee courts having been abolished and the courts of the United States forbidden to enforce Cherokee laws, this necessarily destroyed all Cherokee laws theretofore passed, and at the same time Congress forbade the Cherokee government to pass further laws.

With the council limited to the passage of resolutions, which should not become effective except upon and until the approval of the President, practically nothing was left of the Cherokee government after June 28, 1898, but its executive,

and his term of office expired prior to July 1, 1902, after which there was no law for his re-election.

In this connection we again have evidence of the resolute purpose of Congress to deny any legislative power to the Cherokee council in the first provision of section 28 of the very act we are now considering (April 26, 1906):

> "That no act, ordinance or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity *until approved by the President of the United States.*"

Of course, it is patent error in adjudging "continued existence" of a so-called tribe and its government not to have stated these limitations. With such limitations in mind, the court could not logically have reached its fifth conclusion of law, which indeed seems more properly classified as a finding of fact and should be thus considered in connection with the proposition now being maintained:

**Even if a self-constituted Cherokee Council had sought the legislation now complained of through duly accredited representatives, such action would have been without authority, since there was no existing law to authorize legislation of that character, and therefore no power could be conferred thereby upon Congress to deprive appellants of their property without due process of law.**

Certainly that part of this conclusion which states that the legislation was enacted with the consent and upon the petition of the duly accredited representatives of the Cherokee Nation, as instructed by the National Council, is a statement of an alleged fact. If evidence as to the existence or nonexistence of this fact is before the court, the correctness of the finding may be inquired into. Such evidence is before

the court in the act of April 26, 1906. *That act specifically exempts the Cherokees from the operation of these provisions* in the last proviso but one to section 2, being in these words:

> "That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe, where the date for filing application has been fixed by agreement between said tribe and the United States."

The act of July 1, 1902, when ratified by the popular vote of the Cherokees, "fixed by agreement" the limit for the date of filing application as October 31, 1902 (section 30). Therefore the act of April 26, 1906, denied the very thing which the court finds the Cherokee council, through its "duly accredited representatives," sought to secure, namely, the participation by Cherokee minors born after September 1, 1902, in the allotment and distribution of the communal lands and funds. It was not until June 21, 1906, that this exemption was withdrawn and Cherokee minors born after September 1, 1902 given the right of allotment and distribution.

At this point we wish to make clear to the court that these appellants have no objection whatever to the act of April 26, 1906, *standing alone,* for, as shown, it specifically exempts the Cherokees from the operation of the provision establishing a new class of persons to be provided for out of the remaining lands and funds. Beyond this it recognizes and reaffirms the act of July 1, 1902, in providing in detail the machinery for carrying into final effect the provisions of the allotment act. It does this by directing the Secretary of the Interior to proceed with the sale of the residue of the land, to add the proceeds to the Cherokee fund, and directs its distribution among the persons with whom the agreement of July 1, 1902, was made. And this direction will be the sole authority, under which the Secretary may hereafter sell the unallotted lands.

The mischief is accomplished by the act of June 21, 1906,

which would make section 2 of the act of April 26, 1906, applicable to the Cherokees, and in that way would repeal so much of the act of July 1, 1902, as had by agreement among them terminated their community on September 1, 1902, and changed the communal ownership of the property.

Whether the act of June 21, 1906, making section 2 applicable to the Cherokees was craftily or cunningly procured by representatives of less than one-third of the enrolled Cherokees, is only matter for conjecture. Certainly, there is nothing to show any agreement between the Cherokees and Congress which led to this amendment.

Just what power a petition of the "Cherokee Nation" could have conferred upon Congress the court does not declare; but as it deemed this conclusion of sufficient importance to announce it, it must be that the court found, as a legal proposition, that the self-constituted officers of the so-called Cherokee Nation had the authority to surrender whatever rights its former members had acquired in the former tribal property, even though Congress might not itself have accomplished that end. For such authority we look in vain.

The former members of the Cherokee Nation were citizens of the United States when this resolution was passed, and were under the protection of the Federal Constitution. They owed no allegiance to the Cherokee tribe because it was no longer a tribe to compel obedience; were subject to none of its laws, for there were none; could not involve its protection, for it could not protect. Incapable of legislation which would surrender the rights of its former members, certainly no self-constituted government could accomplish that purpose by a mere resolution. Unable to protect them, it was equally powerless to burden them. Unable itself to effect any change in the status of its former members, to confer rights upon them or deprive them of any rights, it certainly could not, by resolution, authorize Congress to take or destroy their property.

And independently of the limitations upon the legislative power of the Cherokee government—as the act of July 1, 1902 (section 25) imposed a limitation as to who should be enrolled, and as this was accepted by the popular vote of the Cherokee people, there would have been no power in the Cherokee National Council to make any further request in the premises, or to reverse the result of the popular vote, had such council's legal existence continued. The action of the so-called Cherokee National Council, by the resolution of 1905, could not affect the right of distribution of the common property provided for by the act of July 1, 1902, so as to make the subsequent legislation valid by agreement so far as the admission of a new and different class of people is concerned, unless it appear that all persons entitled were individually parties to that agreement and were competent to contract. The inequalities which would immediately result from the admission of third parties, would so change the nature of the absolute title conferred, that no matter what power the National Council of the Cherokees once had, in this regard, such authority could not exist after the whole Cherokee people had acted pursuant to the law of Congress and had accepted the rights conferred.

Let us see into what further error the court was led in this connection. This fifth conclusion (or finding) states that the President approved this resolution. That is true, but that approval had not been given when the "duly accredited representatives" of the Cherokee Nation presented the petition to Congress; nor when the acts of April 26, 1906, and June 21, 1906, were passed; nor was it given *until five months after this suit was brought* (Finding XII, Rec., 24). The fact is that the resolution was passed on September 28, 1905, and that on August 17, 1907, almost two years after the passage of the resolution, the approval of the President of the United States was secured. The attorney for the Cherokee Nation who appeared by intervention in this case, evidently discovered that the commission which claimed to have been

acting for the Cherokees, and to have requested the enactment of the legislation now complained of, had acted under a resolution which conferred no authority whatever upon them, and sought to cure the defect in their authority by this belated approval of the President. Now the law applicable to tribal government declares—

> "that no act, ordinance or resolution of the Creek or Cherokee tribes except for adjournment, shall be of any validity *until* approved by the President of the United States."

It would seem, therefore, that these "accredited representatives" were proceeding without authority when they besought Congress to do this most unnatural thing. That it was unnatural is apparent, when we consider that there were 37,561 persons originally enrolled; that the majority of these must have been minors of tender years; that there were but 5,610 children born after September 1, 1902, and living on March 4, 1906; that their parents, if living, could not have exceeded twice that number, being 11,220 persons, and that there are therefore at least 26,341 persons originally enrolled who have no children enrolled under the later act. Upon the assumption that the red man is as selfish as his white brother, it is a fair conclusion that more than two-thirds of the Cherokees were opposed to the law which took away their rights and gave them to others in whom they had no interest. As this court once said:

> "Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them."

We have submitted that the tribal government, even if it had continued could not authorize Congress to do what it might otherwise have lacked the power to do. Is it not now plain that this petition of its "duly accredited representatives" could not have represented the wishes or the interests of a

very large majority of the Cherokee people? Upon this point it is well worth while to quote from the opinion of Judge Howry, of the court below:

> "The findings which show the methods employed to obtain the action of Congress are immaterial, because in section 2 of the amendments to article I of the Constitution of the Cherokee Nation, the character of the title to the lands of the nation had been changed. That section provided that the lands of the Nation should remain common property, that is, common property of the Nation for the benefit of the tribe, until the National Council should request the survey and allotment of the same in accordance with the provisions of article XX of the treaty of the nineteenth of July, 1866, between the United States and the Cherokee Nation. The National Council had already requested the survey and allotment of the lands in accordance with that treaty, and the request (having been submitted to the Cherokee people under a law of Congress to carry out treaties) had been ratified, and the then existing controversy respecting the affairs of the tribe, had been closed by a decision of this court which was duly affirmed by the Supreme Court in the Cherokee intermarriage cases (203 U. S., 93). Section 25 of the act of July 1, 1902, which imposed a limitation as to who should be enrolled, exhausted the power of the Cherokee National Council to make any further request in the premises. So any subsequent action of the council seeking to reverse the popular vote has nothing to do with this case" (Rec., 39).

But of what avail is a discussion of the character of the tribal government? Suppose the tribe and the government still existed with its original powers. Upon what principle could the National Council annul the result of the popular vote, and, by an unrepresentative and partisan majority of its delegates, sport away the rights of the members of the tribe which had been fixed by agreement between them and the United States?

We conclude our consideration of this subject with the suggestion that if the alleged continuance of the tribal government by the resolution of March 2, 1906, and the act of April 26, 1906, attempted to give to that government the power to authorize Congress by resolution to take property of these appellants without due process of law, such resolution and act of continuance are themselves subject to the same constitutional objections.

**The property remaining unallotted (and not specifically reserved from allotment) and the undistributed fund, were not tribal property, but by the act of July 1, 1902, all right, title, and interest in all the lands and all the funds became vested in those Cherokees who were enrolled as of September 1, 1902.**

This proposition invites attention to our second, fourth, and fifth assignments of error, which allege that the fourth, sixth, and seventh conclusions of law made by the court are erroneous. They may be advantageously considered together.

In the case of Brown & Gritts *vs.* The United States, No. 331, which has been recently heard by this honorable court, the appellants' brief discusses fully the character of the title enjoyed by the Cherokees. To the argument therein made we beg to refer in support of the ultimate statement that when the act of July 1, 1902, became effective with its ratification by the Cherokees, the former community was forever terminated, since by its terms no Cherokee not in being on September 1, 1902, could share in the former communal property.

It is of the very essence of a community that the rights of a member who dies perish with him, and that one born into a community immediately acquires a member's rights. But under the act of July 1, 1902, it was provided that if a Cherokee died after September 1, 1902, his rights should de-

scend to his heirs; if one should be born after that date, he was to take nothing but a right of inheritance, and this right of inheritance extended, not only to allotments of land, *but also to the deceased allottee's proportionate share of other tribal property, from whom he inherited.*

The community, therefore, having been dissolved, and the allottees being capable of transmitting to their heirs, not merely the lands allotted to them, but also their proportionate share of the other tribal property, the title to all the former property of the community must have vested in those enrolled individuals who comprised it at the moment of its dissolution, September 1, 1902. If such be the case, those individuals became the owners in common of all the property. Congress must have so considered their ownership; otherwise, why was it written into the act that any allottee accepting his patent should be "deemed to assent to the allotment and conveyance of the lands of the tribe" to other allottees, and to relinquish his title to the same (that is, to other allotments made to enrolled Cherokees) except in the proceeds of lands reserved from allotment? Otherwise, why was it provided in section 20 of the act of July 1, 1902, that an allottee's lands "with his proportionate share of other tribal property" should descend to his heirs? Otherwise, why was it written in the act of April 26, 1906, that this provision as to children born after the completion of the rolls under previous acts should not apply to the Cherokees? On this point Howry (J.) in his opinion, says:

> "The Cherokee lands had been before this act of July 1, 1902, conveyed to the Cherokee Nation in fee simple (Holden *vs.* Joy, 17 Wall., 211). With the adoption of the Cherokee Constitution, the title to the common property passed from the communal owners and became vested in the nation as public lands and held by the nation in its political and corporate capacity for the whole tribe. (Eastern Cherokees *vs.* U. S., 202 U. S., p. 101). So far then as the legislation had proceeded under the treaties by the act of

> July 1, 1902 (which professed to execute the treaties) the title to the unallotted lands and funds had passed out of the Cherokee Nation and had taken on the character, as to the persons authorized to be enrolled as of September 1, 1902, of an ownership in common for the benefit of all the members of the tribe living as of September 1, 1902" (Rec., 39).

If, then, the property ceased to be tribal with the dissolution of the community, in whom did it vest? This court has said that rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as of present interest (Pearsall *vs.* R. R. Co., 161 U. S., 646-673).

In constitutional law vested rights are those which have so completely or definitively accrued to, or settled in, a person that they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the Government should recognize and protect as being lawful in themselves, and settled according to the then current rules of law, and of which the individual cannot be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare (Black's Law Dict., p. 1218).

If it was within the power of Congress to emancipate the Cherokees from the control of the United States, and to dissolve the community with the consent of its people, and to provide for the distribution of the tribal property, nothing has been left undone to accomplish precisely these conditions. Congress could emancipate them (*In re* Heff, 197 U. S., 488), and it did so by the citizenship act of March 3, 1901. Having plenary power over tribal property, as numerous decisions declare, it could provide for its distribution if the Indians were at the time in tribal relations (Lone Wolf *vs.* U. S., 187; U. S., 553, 565). If they were not in tribal relations, the same disposition of the tribal property could have been made with their consent, which was in this case

given (Cherokee Intermarriage cases, 203 U. S., 93); and if the act providing for the disposition of the property specifically declared that it should be divided among all Cherokees living on a certain day, and specifically excluded all who should die before, and all who should be born after that day, it must have vested all the property in the individual Cherokees living on that day as truly as if their names had been written in the act.

What title would have been established if the 37,561 persons afterward ascertained and enrolled had been specifically named in the act?

If any other persons or body of people had been the recipients of such a grant as was made by the act of July 1, 1902, such persons or body of people thus provided for would be tenants in common, whose rights we would call vested rights. Congress has conferred too many titles in and upon Indians to say that the rights conferred upon them by law cannot be as truly vested in the members of an Indian tribe, as in and upon anybody else within the terms of a grant, irrespective of the citizenship of those Indians receiving such rights.

A grant is complete when the terms of the grant are met. In this case the grant made by Congress raised the presumption that every prerequisite to its completion was complied with. It was neither a void nor a voidable grant, when the conditions imposed by Congress put the parties in possession of their allotments. The same persons became entitled to their share of the common funds upon the evidence of the approved rolls that they possessed the necessary qualifications. If from any cause there remain surplus lands not needed for allotment to the persons living, according to the estimates made of the number of persons entitled and the quantity of land to be allotted, and additional legislation was necessary to carry out the act granting the right, it was competent to enact such legislation; and such legislation was provided in the act of April 26, 1906, unamended, since it

provided details for the disposition of the property remaining unallotted or undistributed.

But, we submit, any legislation having the effect of giving the property or any part of it to a new class of people, is open to as much objection as to provide by another act for the allotments already made to be diminished.

The grant by the Cherokee people to the individual allottees was irrevocable.

A grant implies a contract for the grantor not to reassert the title granted (Fletcher *vs.* Peck, 6 Cr., p. 87). Even where land is once granted by a State its legislative power is incompetent to annul the grant and give the grant to another (Arredondo's case, **6 Peters, 691).**

We cannot read the act or the laws relating to the ownership of property and reach any other conclusion than that the 37,561 persons became tenants in common of all unallotted lands, (except those specifically reserved from allotment), and that each of them has a valid claim against the fund in the Treasury of the United States for his proportionate part of it (Doe *vs.* Wilson, 23 How., 457, 463). That each was entitled to a partition, in kind, of the lands was recognized by the act of July 1, 1902, which provided a method of partition and established a tribunal for making it. That each was entitled to a proportionate share in the tribal property is likewise evidenced by that provision of the act which declared that such proportionate share should be transmissible to the heirs of deceased allottees, and by the act of April 26, 1906, directing the Secretary to sell the residue of the lands and distribute the proceeds among those enrolled as of September 1, 1902.

It seems to counsel impossible to deny that, with the acceptance of this act of July 1, 1902 by the Cherokee people, the right to prospective enjoyment of *all* the lands and *all* the funds of the Cherokee Nation, became the property of the particular persons enrolled, "as of present interest."

The majority opinion of the court below, in declaring that

appellants are not vested with rights in the unallotted lands, cites some authorities to which reference must be made (Rec., pp. 28, 30). Cases are cited to show that the patent vested title in the nation and not in the individuals, and it is declared that the individuals on July 1, 1902, became the communal owners of the lands and funds—with which we are in hearty accord. But the opinion adds a statement of fact that the amount of land allotted was not determined by the Dawes Commission, but by section 11 of the act of July 1, 1902, which is not the case. That section directs the Dawes Commission to allot to the individuals *as many acres* as shall be equal in value to 110 acres of the average allottable land. By reason of difference in soil an allotment of 80 acres might have been equal in value to 110 acres of average allottable land, and for the same reason another allottee might have received 160 acres.

At this point it may be of interest to observe that if the number of Cherokees had been estimated by Congress to be 40,000 there would have been 110½ acres for each individual, as there were 4,420,000 acres to be distributed. (See findings of fact, Brown & Gritts *vs.* U. S., No. 331, Rec., 20.) As showing how Congress was able to determine that there would be about 110 acres in the average allotment, we may refer to the judgment of this honorable court in the Cherokee Intermarriage cases (203 U. S., 93), whereby a certain class of intermarried whites were directed to be stricken from the roll. We have nothing in the record to show how many were so removed from the roll; the number may not even yet be known; but as Congress very probably selected 40,000 as approximating the total number of the Cherokees, and as there are 37,561 finally enrolled, it seems highly probable that the number of white persons removed from the rolls, added to those finally enrolled, would closely approximate 40,000. And if we look at all to finding VI we have it that rolls were being prepared under the act of 1898 and for some years previous to 1902; that the Secretary of the In-

terior had fixed the very day of the passage of the allotment act, July 1, 1902, as the last day on which applications for enrollment might be filed, and that the Interior Department was therefore in position to give to Congress an accurate estimate of the number of Cherokees. But we think this is beside the question and have referred to it merely to emphasize the incorrectness of the declaration that Congress itself determined the amount of land to be allotted.

A further evidence of the purpose of Congress to allot all the lands among these enrolled persons is found in the provision specifically reserving some lands from allotment, the lands so reserved being those in which there was a public interest.

The opinion then declaring that each member of the nation became entitled by reason of the communal ownership to an equal share with his co-owners in the common property, declares that such right is not transformed into a vested right by the act of July 1, 1902, because "the right of a member dying before September 1, 1902, became extinct and passed to the tribe in general." This reason, instead of supporting, denies the conclusion; for we are not concerned with those living on July 1, 1902. The appellants are those living on September 1, 1902. It would seem that the court, in declaring the right of one who died before September 1, 1902, extinct, agreed, as we are now insisting, that the right of one living on September 1, 1902, did not become extinct with his death and that his property did not pass to the tribe in general. The rights of those dying after that date passed, by the terms of the act, to their heirs; and that there should be no question as to what rights passed, the act, in fullest terms, provides that the rights to the allotments of deceased allottees and to their "proportionate share of the tribal property" shall descend to the heirs (sec. 20, Rec., 4).

We earnestly submit that by such provisions in the act of July 1, 1902, the community was to terminate on September 1, 1902, and that, the Cherokees assenting to this, it

did terminate on that day. Prior to that date probably no one could assert a vested interest because he might die before that date; but on that date rights must have vested in those then living, who are the appellants here, if the combined action of Congress and the Cherokee people could ever have vested them.

The court below thought that the certificate of allotment, being conclusive evidence of the right of the allottee to his allotted lands, was sufficient to support its finding that there were no vested rights in other property. But that certificate accomplished the investiture not of a right in common property, but of a fee-simple title to lands specifically designated. It destroyed the rights of all other allottees in that particular allotment, and combined them all in the individual allottee; and it left undisturbed the rights of all allottees in the property not allotted or not distributed.

It seems really a simple proposition that the requirements of the assent of all allottees to a surrender of their rights in other allotments was based upon the theory that they had vested interests in all the lands which were subject to allotment. The court below seems not to have considered the elementary proposition that there are vested interests in property held in common.

In the Massachusetts case of Drew *vs.* Carroll, 28 N. E. Rep., 148, a statute was considered which made all Indians citizens of the State, and gave the right to the Herring Pond Indians to have partition of their common land to be afterwards divided; and where a scheme of allotment was provided in the act it was held that immediately upon the conferring of citizenship upon the Indians they acquired an undivided title, right, and interest in the lands, which they could mortgage even before partition was had.

In Webster *vs.* Reid, 1 Morris, Iowa, 467, it was declared that certain half-breeds of the Sac and Fox tribes held that fee-simple title to their lands as tenants in common, and that the legislature had not the power to destroy

their rights as such tenants in common. Upon this point Judge Howry's opinion says:

> "If the act of July 1, 1902, was an agreement with the members of the Cherokee tribe, and such members were citizens of the United States, there is great force in the argument that each member of the tribe living September 1, 1902, acquired an undivided interest in the common lands, free from any right of change, because the future distribution of that property was designed to be ministerial in character; and the exercise of further plenary power on the part of the Government was not intended except for the benefit of those embraced in the ratified agreement. The further contention that when citizenship was conferred there was no tribe, is likewise of much force. * * * It is a contradiction to say that under the new legislation the rights of the allottees fixed by the act of July 1, 1902, remain the same in and to the unallotted lands, if a new class numbering 5,610 people be admitted, because the new class must necessarily absorb every piece of unallotted land, and to make this new class equal nearly all the available funds must likewise be absorbed for the benefit of the new class. Thus the rights of the former allottees are in effect superseded and are therefore no rights at all, if the Congress have the power to take land and moneys from the old class to give to the new.

**Even if the allottable lands not allotted and the funds undistributed be held to be tribal property, such property must be distributed among all the members of the tribe, and not merely among one class of members (Specification 7).**

The court declared all unallotted and undistributed property to be tribal, and, by its dismissal of the petition, necessarily adjudged that it was distributable only among the 5,610 children born after September 1, 1902.

If the community of the Cherokees did not terminate, as we have insisted, on September 1, 1902, it was not terminated on March 4, 1906. It is not yet terminated, and it will not terminate until the final distribution of the tribal property. If the act of July 1, 1902, did not put an end to the community on September 1, 1902, certainly it did not accomplish the end by the act of April 26, 1906, as amended, for, manifestly, the power to add a class of Cherokees born after September 1, 1902, admits the power to again set the date forward, and again and again, until the last foot of land and the last dollar in money promised to those living on September 1, 1902, has been given away to other persons. As in the court's view there still remain assets of the community, there is still a community of persons among whom they are to be divided. This judgment excludes from that community those 37,561 persons enrolled as of September 1, 1902, and declares that the community is comprised *only* of those 5,610 enrolled minors born after that date and living on March 4, 1906.

After making allotments or money payments to these 5610 persons, there will still remain assets, which, if this decision of the court be correct, are tribal. If Congress should today enact that the remaining assets be divided among persons born after March 4, 1906, such persons would, if this judgment is correct, be the community to the exclusion of all others. Thus, by the mere act of allotment, the individual goes out of the community, leaving no "proportionate share of the tribal property" to descend to his heirs. This being so, if Congress does not provide for the distribution of the remaining million dollars to still another class of persons, those previously enrolled being no longer members of the community, what shall be done with that million dollars of tribal property?

But the individuals did not go out of the community with their allotment. Congress recognized this in the act of April, 1906, when it provided that the assets remaining

after making allotments should be divided pro rata *among all the enrolled persons.* In holding, therefore, that the act of July 1, 1902, did not vest the persons enrolled under that act with interests in all the property, the Court of Claims declared the property remaining unallotted and undistributed to be tribal in its character, but adjudged not a tribal distribution in which all members should share alike, but the distribution of a large amount of tribal property among a certain class of members of the tribe, namely, certain children born since September 1, 1902.

Granting the right of Congress to extend the existence of the community, granting that the property is still tribal, is it not evident that it must be divided among all the members of the community as it exists when the division is made?

It will result that if the lands and funds not allotted or not distributed among those enrolled as of September 1, 1902, are now tribal property, it must be distributed as well to those first enrolled (if still living) as among those enrolled as of March 4, 1906 (if still living) and those living on the date when the property shall lose its tribal character.

The answer to all of which is that the community no longer exists and the remaining property is not tribal, and was not tribal after September 1, 1902.

We have referred with some frequency and much comfort, to the separate opinion of Judge Howry, of the court below, which concurs in large measure, and with admirable argument, in practically all the propositions advanced by appellants; and in so far as it does so, is rather a dissenting than a concurring opinion. His concurrence in the result reached by the court is based only on a doubt growing out of the interpretation to be given to what this honorable court has said with respect to what is, or what may not be, tribal property (Rec., 45).

Let us briefly consider, then, what this court has said upon that subject.

In the case of the Cherokee trust funds (117 U. S., 288) the court was considering the right of certain Cherokee Indians living in the East to certain funds held in trust by the United States for the Cherokee Nation. The judgment was that the lands from the sales of which the proceeds were derived, belonged to the Cherokee Nation for the common benefit of all Cherokees—which of course did not mean that each individual had an interest as a tenant in common (p. 308).

In the case of The Cherokee Nation *vs.* Journeycake, 155 U. S., 196, 207, the opinion referring to the patent issued to the Cherokees declares that whatever of title was conveyed, was conveyed to the Cherokees as a nation, and did not vest in severalty in the individuals. The appellants have no cause of complaint of either of these opinions. On the contrary, they ask attention to the declaration in the opinion just cited in these words:

> The Constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declares in article 1, section 2, that "the lands of the Cherokee Nation shall remain common property," and *while the amendment contemplates a time at which these lands shall cease to be common property,* it is only when, by article 20 of the treaty of 1866, the National Council shall request that they be surveyed and allotted in severalty to the Cherokees.

We italicize the words in this citation to emphasize the suggestion that the contemplated time has been reached when the lands are no longer common property.

In Cherokee Nation *vs.* Hitchcock (187 U. S., 294-307), the court was considering the authority of Congress respecting the leasing of mineral and oil lands, at a time when the lands were still communal, and when the Cherokee Indians were still in tribal relations. In this opinion the court notes the appointment of the Dawes Commission and the authority given to it. It is well to repeat here that the 16th section of the act of March 3, 1893 (27 Stat. L., 645), authorizes the

appointment of Commissioners "to enter into negotiations with the Cherokee Nation * * * *for the purpose of the extinguishment of the national or tribal title* to any lands within that territory * * * *by the allotment and division of the same in severalty among the Indians.* * * *,*" from which we must gather that it was the purpose of Congress, by this very legislation under which appellants claim their rights, to put an end to the tribal holding of property. The opinion contains this statement, of importance in the present case:

> "There is no question involved in this case *as to the taking of property;* the authority which it is proposed to exercise by virtue of the act of 1898 has relation merely to the control and development of *the tribal property,* which still remains subject to administrative control of the Government."

In the case of Lone Wolf *vs.* Hitchcock (187 U. S., 553-565), the ultimate decision was that, as, when the act to dispose of the Kiowa and Comanche lands was passed, the Indians were *in tribal relations,* and the act purported to give an *adequate consideration* for the surplus lands not allotted among the Indians, or reserved for their benefit, the power of Congress was not to be denied. Another reason given by the court was that the title to the Kiowa and Comanche lands was held by the United States, and it was said that the contention of the Indians ignores the status of the contracting parties and the relation of dependency they bore toward the government of the United States. The court refers to the case of U. S. *vs.* Kagama (118 U. S., 375), and cites the following from the opinion:

> "It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the Nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection."

And for these reasons we have a line of decisions upholding the power of Congress to deal with the persons of Indians in tribal relation, respecting their tribal property. But this reasoning is totally inapplicable to the case at bar. These appellants, when the legislation they now complain of was enacted, were *not* the wards of the nation; were *not* communities dependent on the United States for daily food or for political rights.

That the Lone Wolf decision was not intended to apply to any but tribal Indians, or to any but tribal property, is not only perfectly plain from its own language, but, as well, from the citation of previous decisions. For instance, the opinion in the case of the Choctaw Nation (119 U. S., 1, 27), wherein it was declared that Indians who had not been fully emancipated from the control and protection of the United States, are subject, *at least so far as the tribal lands are concerned,* to be controlled by direct legislation of Congress.

It would seem, therefore, that this decision cannot be accepted as a foundation for any doubt as to the persons and character of the property over whom, or over which, the court declared Congress to have plenary power.

In the Heff case (*supra*) the relator had been convicted of the sale of liquor to a Kickapoo Indian who had become under the law a citizen of the United States. The contention of the prosecution was that, notwithstanding the elevation of the Indian to citizenship, it was, nevertheless, unlawful to sell liquor to him. This court said:

> "But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore, State, citizenship, the benefits and burdens of the laws of the State may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of

> obedience to it. Can it be that because one has Indian, and only Indian, blood, in his veins, he is to be forever one of a special class over whom the General Government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this, whether the State or the individual himself consents? We think the reach to which this argument goes, demonstrates that it is unsound."

This familiar case has very recently received again consideration by this honorable court in the case of U. S. *vs.* Celestine, 215 U. S., 278. This also was a criminal case, the question being whether of a homicide, committed upon the reservation of a tribe to which the defendant formerly belonged, the United States courts had jurisdiction. The opinion sustained the jurisdiction of the United States court, for, notwithstanding the defendant had been made a citizen of the United States, the offense was committed within the limits of an Indian reservation over which the Federal courts had exclusive jurisdiction. In the opinion it is said that in the absence of a subjection in terms of the individual Indian to State laws, and denial of further jurisdiction over him by the United States, a statute will not be construed as a renunciation of jurisdiction by the United States of crimes committed by Indians against Indians *on Indian reservations.* The opinion notes that the plea to the jurisdiction of the Federal court "does not challenge the continued tribal organization of the Tulalip Indians, or question that the tribe, as well as the general body of * * * the reservation, continues under the general care of the United States." The two cases are clearly distinguished.

It will be observed that in none of these cases wherein the court upheld the power or competency of Congress to pass laws respecting the lands of an Indian, do the decisions apply to any other lands than those which were *tribal.* And none of them countenance the suggestion that after the tribal character of the lands has been changed, the power of Congress is yet continued over them merely because the owners,

citizens of the United States, are of Indian blood. And in none of them had there been the *taking* of property, except in the Lone Wolf case where such taking was justified because the Indians were *tribal,* the property was *tribal,* the United States was the trustee, and *adequate compensation was provided.*

Recalling that when the things complained of were done, the appellants were citizens of the United States, subject to its laws alone, and entitled to its protection; that their former community had been dissolved by their popular vote, at the instance of Congress; that they rested upon the promise of the Government guaranteeing that they, and they only, should have the lands and funds of the Cherokees, we submit that there are no decisions of this court which permit a doubt that the power of Congress over Indians and Indian lands extends only to tribal Indians and tribal lands; that even as to such lands, the power given to Congress is the power to develop, conserve and protect, by wise administration,—not in utter disregard of the promises it has made and the rights with which it has vested and adorned the Indians, to take away and destroy.

For the reason that Congress has exceeded its power, sought to annul its guaranty, and to deprive a class of citizens of rights which could never be denied to any other class, we submit that the judgment of the Court of Claims should be reversed.

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## APPENDIX A.

### The Jurisdictional Act, March 1, 1907.

[34 Stat. L., 1015.]

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled "An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said acts, authorized to be

brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two.

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## APPENDIX B.

### Cherokee Allotment Act, July 1, 1902.

[32 Statutes at Large, 716.]

An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of the town sites therein, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

DEFINITION OF WORDS EMPLOYED HEREIN.

SEC. 4. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

SEC. 5. The terms "allottable lands" or "lands allottable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter

of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,*

That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands. . . .

RESERVATIONS.

SEC. 24. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provisions of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Spring Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Shiatook Mission, near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or school-house in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day

of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any

manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest, of the Cherokee Nation, and of all other citizens, in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable and he shall

make all needed rules and regulations to carry this provision into effect.

SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable persons akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other

property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result and transmit the same to the President of the United States.

Approved by President, July 1, 1902.

Ratified by Cherokee people, August 7, 1902.

Proclaimed by Tams Bixby, acting chairman Commission to the Five Civilized Tribes, and T. M. Buffington, Principal Chief, Cherokee Nation, August 12, 1902.

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## APPENDIX C.

## Act of April 26, 1906.

[34 Stat., 137.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee,

Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and reënacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day

of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

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SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

*Provided,* That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

* * * * * * *

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the

present system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be pre-

sented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

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SEC. 15. The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes:

*Provided*, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.

SEC. 16. That when allotments as provided by this and other acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

SEC. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the

moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period,

be removed by the act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal or restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized of all or any portion of his allotment prior to the final distribution of the

tribal property, the land shall escheat to and vest in such tary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, and such fact shall be known by the Secre- State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this act appear before the Commissioner to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 24. That in the Choctaw, Chickasaw, and Seminole

nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.

All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain: *Provided, however,* That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction.

SEC. 25. That any light or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute

such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this act: *Provided,* That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an act of Congress entitled "An act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (public, numbered twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said act shall

have no application, and except that hereafter the plats required to be filed by said act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said act, for the purpose of this act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs, and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided,* That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

* * * * * * *

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided,* That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided,* That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further,* That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said

tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

SEC. 29. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved, April 26, 1906.